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The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond

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THE UNANTICIPATED RIPPLES OF COMPARATIVE NEGLIGENCE: SUPERSEDING CAUSE IN PRODUCTS LIABILITY AND BEYOND

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I. INTRODUCTION

Contributory negligence is a rule that bars plaintiffs from recovering in a negligence action. Replacing contributory negligence with comparative negligence replaces that rule with a rule that permits a negligent plaintiff to recover a portion of her damages, right?

Yes and no. Comparative negligence does that, but like a stone thrown into a pond, the ripple effects of comparative negligence are far broader than merely removing the bar to recovery by a negligent plaintiff. We might think of the first ring of effects as the abolition of doctrines developed to ameliorate the harshness of contributory negligence, including last clear chance and stricter rules of proximate cause for plaintiff contributory negligence. But there are several more and larger rings of ripples that cut a wide swath across tort law. Indeed, the breadth and depth of the impact of comparative negligence on tort law belies the conception that comparative fault merely changes the rule about apportioning liability between a negligent plaintiff and defendant.

In addition to permitting plaintiffs to maintain a negligence suit despite their own fault, comparative negligence afforded courts the opportunity to apportion liability in a more fine-grained manner than an all-or-nothing or pro rata basis. Contributory negligence *could* have been replaced with a pro rata system for

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apportionment between plaintiffs and defendants.¹ Alternatively, it could have been replaced with a rule that placed all of the liability on the party found most at fault.² Employing a 100-unit scale for apportioning liability meant courts no longer had to choose from the crude array of tools for apportioning liability among the parties to a suit, which sometimes required selecting the tool that produced the lesser of two evils.³ Comparative contribution, a logical outgrowth of comparative negligence, permitted as discriminating a scale for allocating damages as usefully could be employed.⁴

Comparative negligence has also influenced tort claims outside the negligence universe. Historically, defenses were specific to the individual tort claim asserted: contributory negligence was a defense to a negligence action but not to a strict liability or intentional tort claim. Self defense was a defense specific to intentional torts and so on. While the full impact of comparative fault on intentional torts has yet to be realized, a significant body of cases now permits the use of comparative responsibility⁵ in apportioning liability among negligent and intentional tortfeasors.⁶ Indeed, a number of courts permit defendants who have committed intentional torts to assert comparative responsibility by the plaintiff as a defense, at least in cases in which the plaintiff's conduct might be thought of as unreasonably provoking the defendant.⁷ That is not what most of us were taught in law school—defenses to intentional torts include consent, self-defense, and some other particularized defenses, but these defenses are specific to intentional torts.

In strict products liability, comparative responsibility has had an even more dramatic effect. Negligence by the plaintiff was not a defense in a strict products liability case in the early days of § 402A,⁸ a rule at least in part based on the

1. Cf. *Daly v. Gen. Motors Corp.*, 575 P.2d 1162, 1176 (Cal. 1978) (Clark, J., concurring) (advocating uniform percentage reduction for all negligent plaintiffs).

2. A similar rule existed in Illinois in the nineteenth century. See *Galena & Chicago Union R.R. Co. v. Jacobs*, 20 Ill. 478, 497 (1858).

3. Comparative fault actually permits an apportionment that is even more finely-grained than that provided by a centesimal, given the availability of decimal divisions. See *infra* Part III.

4. See *infra* Part III.

5. I use this term to refer to apportionment among multiple tortfeasors as it encompasses all forms of tortious conduct. It is also the terminology employed in the RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (2000).

6. See *infra* note 85 and accompanying text.

7. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmt. c, Reporters' Note (2000). England, Canada, and New Zealand have interpreted their comparative fault statutes to permit apportionment of fault to plaintiff in an intentional tort case. See ALLEN M. LINDEN, CANADIAN TORT LAW 94-95 (6th ed. 1997); W. V. H. ROGERS, WINFIELD & JOLOWICZ ON TORT 234 & n.65 (15th ed. 1998); Hoebergen v. Koppens, [1974] 2 N.Z.L.R. 597, 603. For a provocative claim that criminal law reflects aspects of a comparative responsibility approach, especially when the victim has provoked the attack, see Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CALIF. L. REV. 1181, 1211-26 (1994).

8. See, e.g., *McCown v. Int'l Harvester Co.*, 342 A.2d 381 (Pa. 1975) (rejecting contributory negligence as a defense to claims based on § 402A); 2 DAVID G. OWEN, M. STUART MADDEN & MARY J. DAVIS, MADDEN & OWEN ON PRODUCTS LIABILITY § 14:2, at 21 (3d ed. 2000) [hereinafter 2 MADDEN & OWEN ON PRODUCTS LIABILITY] ("[M]ost courts quickly adopted comment n's rejection of the defense of simple contributory negligence as a bar to strict products liability in tort."). To be sure, the

harshness of visiting the entire loss on but one of several persons who had engaged in conduct proscribed by tort law. Comparative responsibility, which followed shortly thereafter, obviated that concern and contributed to the transition to a rule that has largely captured the products liability day—a plaintiff's negligent conduct reduces but does not bar a strict products liability claim.⁹ I expect the same will be true in future cases employing strict liability for abnormally dangerous activity in which a plaintiff acts unreasonably.¹⁰

Beyond this unifying effect on the defenses available in a tort suit based on physical harm, comparative responsibility has affected (and may yet affect) a number of other tort law rules that were developed in a day when plaintiffs' negligence barred recovery. Those rules were developed in a legal environment in which only blameless plaintiffs could recover in a negligence action. The most significant of these rules holds independent tortfeasors jointly and severally liable for a plaintiff's harm.¹¹ Joint and several liability has two effects: it imposes the risk that another defendant will be insolvent on the remaining defendants, and it leaves the burden of joining other potentially liable parties on the defendant(s).¹² The justification for imposing the risk of insolvency on defendants, however, is that as between an innocent plaintiff and culpable defendants, it is fair that the latter bear this risk.¹³ Thus, we should not be surprised that as comparative responsibility became established, joint and several liability fell out of favor. Today, joint and several liability survives in but fifteen states, including the five remaining contributory negligence jurisdictions.¹⁴ Although joint and several liability is the most notable of the legal doctrines affected in this way by the advent of comparative responsibility, it is not the only doctrine to be so affected. The rule placing the burden of proof on defendants to apportion the harm when the extent

Restatement (Second) of Torts only provided that negligent failure to discover a defect was not a defense and did not address the remaining range of negligent behavior by plaintiffs. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).

9. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17 cmt. a, Reporters' Note (1998).

10. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 25 (Tentative Draft No. 1, 2001).

11. See *infra* notes 83-84 and accompanying text.

12. Plaintiffs often assume this burden because it is in their strategic interests.

13. Professor Richard Wright argues that joint and several liability is justified even after the adoption of comparative responsibility because each defendant's culpable behavior is the cause of the entirety of plaintiff's harm. See Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1209 (1988). Professor Wright helpfully makes the point that apportioning liability based on comparative responsibility does not alter the fact that each defendant is a cause of the entirety of the harm. *Id.* at 1152-53. The difficulty with his argument is that the plaintiff's negligence is also a cause of the harm, leaving no reason to prefer the defendants over the plaintiff to bear the risk of insolvency. Professor Wright subsequently acknowledged the fairness of apportioning the risk of a defendant's insolvency among all of the remaining responsible parties, including the plaintiff. See Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEMPHIS ST. U. L. REV. 45, 77-78 (1992).

14. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 cmt. a, Reporters' Note (2000).

of harm each caused is uncertain is another example.¹⁵ The burden-shifting rule of *Summers v. Tice*,¹⁶ the case involving two hunters who fired negligently but only one of whom caused the plaintiff's harm, is another potential example of a rule that may be affected by comparative responsibility.¹⁷ A tertiary ring of ripples exists—further modifications effected by the changes described above. The law apportioning liability for occupational injuries when an injured employee pursues a products liability claim and the employer's (or co-employee's) negligence also caused the injury has been a festering sore in the law since products liability became a serious basis of liability and was applied to occupational injuries.¹⁸ The advent of

15. See RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965) (stating the rule that the burden of proof for causal apportionment is on defendants); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. h (2000) (explaining that the advent of comparative responsibility undermines the rationale for imposing the burden of proof on defendants and suggesting alternative options that accommodate the effect of comparative responsibility).

16. 199 P.2d 1 (Cal. 1948).

17. Alternative liability was based on the ground that as between culpable defendants and innocent plaintiff, the defendants should bear the burden of proof on causation when plaintiff reasonably was unable to do so. *Id.* at 4. Despite several decades of comparative responsibility, we have found only two cases in which the suggestion of plaintiff negligence existed along with a claim based on alternative liability. One such case is *Bowman v. Redding & Co.*, 449 F.2d 956 (D.C. Cir. 1971). The court did not face the question of reconciling alternative liability and plaintiff negligence because the District of Columbia is a jurisdiction in which contributory negligence remains a complete bar to recovery. *Id.* The second such case is *Vahey v. Sacia*, 178 Cal. Rptr. 559 (Ct. App. 1981). In *Vahey*, the court reversed a judgment for defendant based on the failure of the trial court to give an alternative liability instruction. *Id.* at 564. Defendant argued that the instruction was inappropriate because the plaintiff's failure to wear a seat belt may have also caused or contributed to her injuries. *Id.* at 562. The court's initial response was that the jury should be instructed that only if it found that the plaintiff was not negligent would alternative liability and a concomitant shift in the burden of proof be appropriate, which is consistent with the suggestion in this Essay. *Id.* at 563. However, the court went on to suggest that comparative responsibility was consistent with the rationale for alternative liability, but the court failed to articulate that rationale. *Id.* Later in its opinion, the court, in responding to another argument, stated that the basis of alternative liability was the defendant's acting in a way that deprived the plaintiff of the ability to prove her claim. *Id.* However, in the same sense that the defendant's (and other tortfeasors') negligence in causing the plaintiff harm created the difficulty of proof, so did the plaintiff's contributory negligence, without which the plaintiff would not have been harmed and therefore would not have faced the difficulty of proving which defendant's negligence was a cause of the harm. See DAN B. DOBBS, *THE LAW OF TORTS* § 175, at 429 (2000) ("[T]he strong moral basis for treating the negligent defendants as causes in fact of the harm could become quite attenuated.").

18. See Arthur Larson, *Third-Party Action Over Against Workers' Compensation Employer*, 1982 DUKE L.J. 483, 484 ("Perhaps the most evenly-balanced controversy in all of workers' compensation law is the question whether a third party in an action by the employee can get contribution or indemnity from the employer, when the employer's negligence has caused or contributed to the employee's injury."); see generally Thomas A. Eaton, *Revisiting the Intersection of Workers' Compensation and Product Liability: An Assessment of a Proposed Federal Solution to an Old Problem*, 64 TENN. L. REV. 881 (1997).

Regarding the development of suits by injured employees against third-party product manufacturers, see Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 938 n.46 (1981) (suggesting that there was a paucity of suits by injured employees against industrial machinery manufacturers in the pre-*MacPherson* period); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963,

several liability has changed the manner in which liability is apportioned, and it has set the stage for courts so inclined to take further steps toward a more equitable apportionment of liability by reducing or abrogating the employers' lien for workers compensation payments from a tort recovery by employees.¹⁹ Another tertiary effect in the strict products liability field is limiting the generous employment of assumption of risk and misuse that occurred when contributory negligence was not a defense.²⁰

Each of these developments has its own story. Nevertheless, I choose to focus on yet another one—the impact of comparative responsibility concepts in the area of proximate cause, specifically the idea of superseding causes that are said to “cut off” the liability of a prior tortfeasor. Proximate cause and superseding cause play a significant role in determining whether liability will be imposed on a tortfeasor when another person's acts, especially culpable acts, occur after the tortfeasor's conduct.²¹ This Essay focuses on intervening acts that might be characterized as “unforeseeable” and which therefore have constituted superseding causes that negate the liability of a prior tortfeasor. The change discussed is not solely attributable to comparative responsibility, and so I must abandon the ripple metaphor. Ripples do not intersect, so I cannot describe this development as the confluence of several layers of ripples. Putting aside ripples, I merely observe that comparative responsibility provides a powerful denouement to the evolution in legal treatment of superseding causes.

This Symposium is devoted to products liability, and in keeping with that subject matter, this Essay discusses the evolution of superseding cause law in the products liability context. The field is rich enough and the role of superseding cause in products liability cases is significant and varied enough to permit a full explanation of the impact of comparative responsibility on superseding cause. Although that is the focus in this Essay, there is no reason why this development is or should be limited to such cases.

I want to disclaim any suggestion that I am the first to appreciate or advocate the effect of comparative responsibility and its affiliated changes on superseding cause. There has already been significant judicial recognition of the need to rethink superseding cause law in light of comparative responsibility. The Supreme Court considered the matter in an admiralty case and concluded, contrary to the position

974 & n.57 (1981) (identifying the recent growth of third-party products claims by occupationally-injured plaintiffs).

19. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B19 cmt. 1 (2000).

20. See DAVID A. FISCHER ET AL., PRODUCTS LIABILITY 571-78 (3d ed. 2002).

21. Doctrinally, intervening acts are not limited to human agency and include forces of nature. See RESTATEMENT (SECOND) OF TORTS § 442 (1965) (describing intervening “forces”). However, as a perusal of the *Second Restatement* and superseding cause cases reveals, natural forces play an exceedingly minimal role in the universe of superseding causes. See *id.* §§ 442-53. Only one section in the *Second Restatement* deals explicitly with forces of nature, and the rule it expresses—that natural forces that produce harm of a different kind from the harm the risk of which made the defendant's conduct negligent are superseding causes—is merely a reiteration of the basic proximate cause limit on liability. *Id.* § 440. Thus, it offers no additional limitation on liability. Therefore, I focus on conscious human agency as superseding causes in this Essay.

presented here, that comparative responsibility does not affect proximate or superseding cause doctrine.²² A number of commentators also have ventured into various aspects of the topic that I am pursuing.²³ Although not original, I hope that this effort serves as a reasonably coherent explanation and justification for this unanticipated impact of comparative responsibility.

A few words about the reasons I chose this subject in light of the purpose of this Symposium are appropriate at this point. In the latter part of the 1990s, I was a co-Reporter, along with Bill Powers, for a portion of the *Restatement (Third) of Torts* that addressed comparative responsibility and other apportionment issues. While that *Restatement* confronted the issue about which I write in this Essay, the *Restatement* recognized that the question was most appropriately resolved in a *Restatement* that addressed the basic principles of tort law, including proximate cause.²⁴ In 1996, Gary Schwartz was named the Reporter for the *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)*.²⁵ His assuming responsibility for the *Restatement* that would address the major developments in the core area of tort law since the *Second Restatement*, a third of a century before, was fitting, as he was the Prosser of the modern generation. Gary is, in my view, the premier torts academic of the latter part of the twentieth century. Had Gary lived, he would have shepherded the issue about which I write through the American Law Institute's labyrinth. His untimely death and my role, again with Bill Powers, in completing Gary's work on the *Liability for Physical Harm Restatement* provides

22. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 836, 839 (1996); see *infra* notes 110-31 and accompanying text.

23. See, e.g., DOBBS, *supra* note 17, §§ 183, 187, at 451-52, 463 (2000); VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 93-95 (3d ed. 1994) (discussing the potential effect of comparative negligence on proximate cause determinations); David W. Robertson, *Love and Fury: Recent Radical Revisions to the Law of Comparative Fault*, 59 LA. L. REV. 175, 190-91 (1998); Terry Christlieb, Note, *Why Superseding Cause Analysis Should be Abandoned*, 72 TEX. L. REV. 161, 181 (1993) (arguing that superseding cause has no place in comparative fault systems). But see Richard W. Laugesen, *Colorado Comparative Negligence*, 48 DENV. L.J. 469, 486 (1972) ("[C]onsiderations of proximate cause under comparative negligence should theoretically remain as they existed before the [comparative negligence] Act.").

24. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 cmt. c (2000) ("Comparative responsibility may affect what constitutes a superseding cause, but that issue is beyond the scope of this Restatement").

25. The universe that I address in this Essay is suits for personal injury or property damage. This world includes contemporary products liability actions but excludes a substantial number of tort suits in which the harm is economic loss or emotional distress. Consistent with our limited universe of cases, I note that all of the modern Torts Restatements are limited to cases in which plaintiffs seek to recover for personal injury or property damage. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 21 (1998); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 (2000); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 4 (Tentative Draft No. 1, 2001). Limitations on liability in those arenas are most often obtained through duty rules, but proximate cause is also often employed, especially when the basis for suit is a statute which proscribes conduct that causes economic loss.

the reason for selecting this topic in this splendid memorial to a genuine giant in modern tort law.²⁶

The class of cases this Essay confronts include those such as *Baker v. International Harvester Co.*,²⁷ in which a plaintiff's (or a plaintiff decedent's) conduct is held to bar recovery on superseding cause grounds. In *Baker*, plaintiff's decedent boarded a ladder on a farm combine with a gun for the purpose of hunting from the combine.²⁸ The driver of the combine was not initially aware of the presence of plaintiff's decedent; after the driver discovered the presence of the passenger and attempted to stop, plaintiff's decedent fell off and was killed.²⁹ Plaintiff alleged a variety of defects in the design and warnings of the combine that she claimed made it unreasonably dangerous.³⁰ Without addressing this evidence, the court affirmed a directed verdict for the defendant on the ground that the use of the combine by the decedent was neither intended nor anticipated by the manufacturer.³¹

Another exemplary case, this time with a criminal act constituting the superseding cause, is *Delk v. Holiday Inns, Inc.*³² In *Delk*, plaintiff sued the manufacturer of a rug alleged to be defective because of its flammability.³³ Because an arsonist was the source of ignition, which the court found to be a superseding cause, the defendant was absolved of liability for the harm from the fire.³⁴ The final category of cases I would like to highlight is that of occupational injuries in which a product manufacturer is absolved of liability because of the intervening acts of the employer or a co-employee.³⁵

What is common to all of these cases is that while the intervening act arguably fell within the class of acts whose intervention prevented a prior tortfeasor from being held liable, the harm that ultimately resulted was the sort of harm one might

26. During my collaboration with Bill Powers on the *Restatement (Third) of Torts: Apportionment of Liability*, he identified and we discussed many of the ideas contained in this Essay. I cannot recall and identify each of his contributions to the ideas in this Essay, but they are enormous. Any mistake, as is true of all of our collaborations, are mine alone.

27. 660 S.W.2d 21 (Mo. Ct. App. 1983).

28. *Id.* at 22.

29. *Id.* at 22-23.

30. *Id.* at 23.

31. In explaining its conclusion, the court characterized the use by the decedent quite specifically, focusing on his unannounced and unexpected status—boarding the combine from the ladder—and on his carrying of a gun. *Id.* Although the court did not use superseding cause terminology, the “unanticipated use” language is often substituted in the products liability field. The *Baker* court did invoke no-duty language with regard to the plaintiff's inadequate warning claim. *Id.*

32. 545 F. Supp. 969 (S.D. Ohio 1982). *Contra* *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886, 894 (9th Cir. 1977) (holding defendant carpet maker liable because it knew of the danger of arson and failed to take appropriate safety measures).

33. *Delk*, 545 F. Supp. at 970.

34. *Id.* at 972.

35. *See, e.g., Davis v. Komatsu Am. Indus. Corp.*, 46 F. Supp. 2d 745, 752 (W.D. Tenn. 1999); *Mueller v. Jeffrey Mfg. Co.*, 494 F. Supp. 275, 277 (E.D. Pa. 1980); *Temple v. Wean United, Inc.*, 364 N.E.2d 267, 271-72 (Ohio 1977).

have expected to occur as a result of the defect in the product or of negligence by the manufacturer.

II. THE HISTORICAL ROLE OF PROXIMATE CAUSE

To appreciate the changes wrought by comparative responsibility and by the modification of joint and several liability, I consider the days in which intervening act and superseding cause law was developed and elaborated.³⁶ The prevailing jurisprudence was that law was scientifically based and that correct legal principles could be deduced through logical and objective inquiry. Consistent with this philosophy, *the* proximate cause of any event could be determined through a neutral, scientific inquiry. Rules regarding which intervening acts prevented prior acts from being the cause of subsequent harm were integral to this inquiry.³⁷ Causes were evaluated and analyzed to determine which was the proximate cause and which were merely remote causes.³⁸ Superseding causes “broke the chain of causation,” preventing antecedent conduct from being a proximate cause of harm.³⁹ While courts and commentators appreciated that there was a distinction between those conditions necessary for an outcome—factual causes—and the determination of which was the proximate cause,⁴⁰ the causal inquiry was viewed as a unitary,

36. Professor Patrick Kelley dates this period as the early nineteenth century, with proximate cause not becoming well established until the 1840s. See Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 64 (1991).

37. An early, influential American case on proximate cause, *Harrison v. Berkley*, 32 S.C.L. (1 Strob.) 525 (1847), declared: “The [causal] connexion is usually enfeebled, and the influence of the injurious act controlled, where the wrongful act of a third person intervenes, and where any new agent, introduced by accident or design, becomes more powerful in producing the consequence, than the first injurious act.” *Id.* at 549.

38. *Id.* at 549; see Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925).

39. See *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1876) (“[W]hen there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.”); *Christianson v. Chicago, St. P., M. & O. Ry. Co.*, 69 N.W. 640, 641 (Minn. 1896) (“Consequences which follow an unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate . . .”).

40. See, e.g., Joseph W. Bingham, *Some Suggestions Concerning “Legal Cause” at Common Law*, 9 COLUM. L. REV. 16, 34, 35 (1909) (distinguishing necessary or but-for causes of an outcome and explaining that when courts seek the cause of an injury, they are not engaged in finding some inherent differences in the necessary conditions, but are inquiring into whether the harm that occurred was within the duty imposed on the defendant to prevent it); McLaughlin, *supra* note 38, at 153-56 (discussing and distinguishing causation in fact from proximate cause).

The common law distinction between trespass cases, which required that the harm be directly caused by the defendant, and case, which permitted recovery for indirectly caused harm, required appreciation that, at least for some cases, there could be additional factual causes of an injury. See *infra* note 41.

objective inquiry conducted according to the formal rules established by law.⁴¹ One of the earliest torts treatises reveals a full appreciation of the many necessary causes for an outcome.⁴² The authors go on to explain the impossibility of imposing liability on all of the culpable causes and then articulate a rule to identify “the proximate cause” that appears to be a “last wrongdoer” rule.⁴³ Thus, proximate cause played a substantial role in limiting the reach of tort liability.⁴⁴

There were, to be sure, cracks in the causal edifice. Nicholas St. John Green wrote an essay in 1870 about proximate cause and argued that it was not a matter of scientific inquiry and objectivity, but was determined by the purpose for which the inquiry was conducted.⁴⁵ Only after the cause of interest is identified based on the reason for the inquiry can causes be separated into those that are proximate and those that are remote.⁴⁶ Therefore, proximate cause is not about time or space, but rather is about the choice from among these necessary elements for an outcome based on the needs of any particular inquiry.⁴⁷ Harm that “prudent foresight” might have avoided was proximately caused by negligence, Green claimed.⁴⁸ But Green’s

41. See *Martin v. St. Louis, I.M. & S. Ry. Co.*, 19 S.W. 314, 317 (Ark. 1892) (acknowledging that defendant’s breach of contract was a factual cause of the plaintiff’s harm, but denying that it was the “juridical cause” of the harm because it was not “direct” and “proximate”); *Gage v. Harvey*, 48 S.W. 898, 898 (Ark. 1898) (noting that the “causal connection between negligence and damage is broken by the interposition of independent responsible human action”); *Gilman v. Noyes*, 57 N.H. 627, 1876 WL 5348, at *3 (Aug. 11, 1876) (a jury question as to whether bear’s destruction of sheep was a “new cause,” natural and reasonable, relieving defendant of liability for negligent failure to secure fencing); *Davies v. Mann*, 152 Eng. Rep. 588, 589 (1842) (giving a jury instruction in a “last clear chance” case that if defendant’s negligence was the proximate cause of harm, plaintiff could recover despite his own contributory negligence); 45 C.J.S. *Negligence* § 489, at 928 (1928) (footnote omitted) (“The law will not look back from the injurious consequences beyond the last efficient cause, especially where an intelligent and responsible human being has intervened.”); Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 109 (1911). Cases such as *Martin*, *Gage*, and *Gilman* were still exerting influence half a century later. See *Langston v. Moseley*, 265 S.W.2d 697, 699 (Ark. 1954) (Ward, J., dissenting).

42. 1 THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 7 (1869); see also EDWARD P. WEEKS, THE DOCTRINE OF DAMNUM ABSQUE INJURIA [INJURY WITHOUT WRONG] § 115, at 231 (1879) (citing John Stuart Mill and his “sum of all antecedents” explanation of the causes of an event).

43. SHEARMAN & REDFIELD, *supra* note 42, at 8. The authors, however, identify the proximate cause as the “first link” in the causal chain, rather than the last one. The inference that they meant by the last wrongdoer is supported by their subsequent discussion of an exception to the rule, applicable when the negligence is not “the nearest cause in the order of time.” *Id.* Another prominent treatise of the day is less helpful in explaining the role of proximate cause. 1 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS (1859). It contains sketchy, confusing, and inconsistent references to the law of proximate cause. Compare *id.* at 90 (stating that cause cannot be established by “independent, illegal acts of third persons”) with *id.* at 94 (reciting the foreseeability standard articulated by Baron Pollock in *Rigby v. Hewitt* without identifying it as a concurring opinion).

44. For a more thorough account of the history of proximate cause, see Kelley, *supra* note 36, at 54-105. This section on the history of proximate cause draws substantially on Professor Kelley’s work.

45. Nicholas St. John Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201, 211-16 (1870).

46. *Id.* at 213-14.

47. *Id.*

48. *Id.* at 215.

work was largely ignored at the time. Baron Pollock of the Court of Exchequer is credited with articulating a foreseeable consequences standard for proximate cause in negligence cases in 1850, but he had to do so in concurring opinions.⁴⁹ Pollock's foreseeability test garnered some support in other cases until the Court of Appeal decision in *In re Polemis* announced a direct-remote test for determining the scope of liability.⁵⁰ Yet, even when employing a foreseeability standard for harm that is unusual, unexpected, or different in kind from the sort of harm risked by the tortious conduct, superseding causes—those intervening human acts sufficiently significant that we take notice of them—can still operate in a robust manner.⁵¹ Eventually, the realist movement exposed many of the shrouds and mystiques of its jurisprudential forebears; the concept that a single cause of an outcome could be identified in a normative and objective fashion was just one of many early ideas that was later debunked.⁵²

Common law joinder rules of the day provided succor for a robust role for proximate cause and the superseding cause subspecies.⁵³ These rules prevented joinder of those who acted independently to cause a plaintiff's injury.⁵⁴ Plaintiffs were limited to suing a single defendant, effectively imposing joint and several liability on that defendant, who could be held liable for all damages.⁵⁵ Others who were negligent or acted intentionally, so long as they did not act in concert, could not be joined in the action as parties.⁵⁶ Within this procedural framework, the last wrongdoer rule had the felicitous effect of limiting those whom the plaintiff could sue successfully.⁵⁷ *Vicars v. Wilcox*, a leading early nineteenth-century authority,

49. See *Rigby v. Hewitt*, 155 Eng. Rep. 103, 104 (1850) (Pollock, J., concurring); *Greenland v. Chaplin*, 155 Eng. Rep. 104, 106 (1850) (Pollock, J., concurring).

50. *In re Polemis*, 3 K.B. 560 (1921).

51. Indeed, that was the argument between Francis Wharton, a leading critic of the foreseeability cases, and Nicholas St. John Green. Wharton argued that the law need not concern itself with all of the antecedent forces that are necessary causes. FRANCIS WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE 73-84 (Philadelphia, Kay & Bro., 2d ed. 1878). Only the acts of responsible individuals could be addressed by the law, and the proximate cause was the last wrongdoer in the causal sequence, Wharton insisted. *Id.* That Wharton's views were extreme is revealed by other contemporary and conventional criticism of his views. See, e.g., WEEKS, *supra* note 42, § 129, at 271 (responding to Wharton's argument that the causal connection is broken by subsequent plaintiff negligence by inquiring whether it would be better to have the plaintiff and defendant bear the loss equally).

52. Leon Green published a text on proximate cause that clearly distinguished between factual cause and liability limits and dismissed the language employed by courts to dress and categorize causes as so much drivel. LEON GREEN, RATIONALE OF PROXIMATE CAUSE 132-36 (1927). Roscoe Pound later characterized Green's work as a "a real step forward." Roscoe Pound, *Causation*, 67 YALE L.J. 1, 11 (1957).

53. See WILLIAM L. PROSSER, LAW OF TORTS § 44 (3d ed. 1964).

54. *Id.*

55. *Id.*

56. *Id.*

57. See *Clifford v. Atl. Cotton Mills*, 15 N.E. 84, 87 (Mass. 1888) ("[T]he general tendency has been to look no further back than the last wrong-doer, especially when he has complete and intelligent control of the consequences of the earlier wrongful act."); see also H. L. A. HART & TONY HONORÉ, CAUSATION IN THE LAW 277 (2d ed. 1985) (describing the last wrongdoer rule as a reflection of the view that tort law should provide only one person for a plaintiff to sue); Laurence H. Eldredge,

so declared.⁵⁸ To be sure, exceptions were required when the rule led to a result that imposed liability on a peripherally involved, but later acting, individual.

Even after the adoption of the procedural codes and more permissive joinder rules in the mid-eighteenth century, joint and several liability provided a plaintiff with a weapon that could be wielded to produce substantially unfair results.⁵⁹ Joint and several liability permits a plaintiff to sue any one or a combination of the jointly liable tortfeasors and to obtain a judgment for the full amount of the damages.⁶⁰ We must remember that this rule operated at a time when contribution among joint tortfeasors was unavailable.⁶¹ Thus, a defendant could be singled out by a plaintiff and, despite paying the entirety of the plaintiff's judgment, could not obtain from other tortfeasors their share of the plaintiff's harm.⁶² Thus, there remained a reason to limit the number of persons who might be liable to the plaintiff even with expanded joinder rules. Preferably, the devices employed would permit identification of the most culpable tortfeasor. Otherwise, a plaintiff would be free to sue and recover from a modestly culpable defendant who nevertheless carried a larger purse than another more culpable but less wealthy person. The last wrongdoer rule, which proved too maladroit to accomplish the goal, nevertheless contributed to the effort to limit the number of parties who might be liable to the plaintiff. Particularly when the intervening act was the product of intentionally tortious or criminal behavior, superseding cause doctrine prevented a negligent individual from bearing the entirety (or any) of the liability in which considerably more culpable conduct played a role.⁶³

Culpable Intervention as Superseding Cause, 86 U. PA. L. REV. 121, 124-25 (1937) (describing the evolution of the last human wrongdoer rule as an aspect of causation and its dissipation in the early part of the twentieth century).

58. *Vicars v. Wilcox*, 103 Eng. Rep. 244, 245 (1806).

59. The RESTATEMENT OF TORTS § 875 (1939) stated a rule of joint and several liability.

60. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 cmt. b (2000).

61. The rule against contribution is credited to *Merryweather v. Nixan*, 101 Eng. Rep. 1337, 1337 (1799), although that case involved two intentional tortfeasors. Nevertheless, the rule was carried forward and applied in negligence actions until 1939, when the Uniform Contribution Among Tortfeasors Act was first promulgated and was thereafter adopted by a substantial number of states. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 23 cmt. a, Reporters' Note (2000). Contribution was not provided for in the RESTATEMENT OF TORTS § 875 (1939), but was added in 1979 to the RESTATEMENT (SECOND) OF TORTS (1979) in § 886A. Roscoe Pound commented on the impact of expanded joinder rules and contribution among tortfeasors:

Today, as joinder of independent wrongdoers and contribution among tortfeasors are possible, determination of the ambit of each of a number of negligences relieves the law of much of the difficult balancing of interests which gave pause when the whole loss had to fall upon one of the tortfeasors or else upon the person injured.

Pound, *supra* note 52, at 11.

62. See *Merryweather*, 101 Eng. Rep. at 1337.

63. See, e.g., *Crandall v. Consol. Tel., Tel. & Elec. Co.*, 127 P. 994, 997 (Ariz. 1912) ("The criminal act of a third party can never be the natural sequence in the link of circumstances leading up to an injury, but, when such act is present, it must be considered as the efficient proximate cause of the subsequent injury, and the law will not go beyond it for a proximate cause."). In *Alexander v. Town of New Castle*, 17 N.E. 200, 201 (Ind. 1988), a defendant municipality which was allegedly

To the extent that the growth of tort cases in the latter part of the nineteenth century, driven by the Industrial Revolution, was thought to require limitations because of the threat to burgeoning industry, a controversial proposition among legal historians, superseding cause was already in place and was sufficiently robust to assist in the effort.⁶⁴

The influence of the last wrongdoer rule and its absolutist approach was largely eroded by the early twentieth century.⁶⁵ Despite the retreat from an outright bar, superseding causes played a prominent role in providing all-or-nothing apportioning of liability when there were multiple tortfeasors.⁶⁶ Indeed, superseding causes were employed to justify denying liability in a variety of instances in which courts intuited that liability should not be imposed and needed a doctrinal rationale for that result.⁶⁷

negligent for leaving a sidewalk in disrepair by permitting an excavation to remain unenclosed was exonerated when the plaintiff was thrown into the hole by a prisoner whom plaintiff was accompanying from courthouse to jail. *Id.* The prisoner, an independent agent, was the superseding cause of the plaintiff's harm. *Id.* Francis Wharton, the author of one of the leading torts treatises of the mid-nineteenth century, championed this view. He argued that if without the intervention of another responsible human agent the plaintiff would not have suffered injury, the defendant's negligence was not a proximate cause of the plaintiff's harm. *See* WHARTON, *supra* note 51, § 134. Professors Hart and Honoré display considerable sympathy for the idea that intentional conduct should be a superseding cause of harm. HART & HONORÉ, *supra* note 57, at 74-75, 277-78.

64. Kelley, *supra* note 36, at 81 ("More and more cases seemed to be decided on proximate cause grounds as the nineteenth century drew to a close."). Recent work by a legal historian suggests another motivation for finding limits on liability. The effort to confine liability to negligently caused harm required explanation in the period before negligence clearly displaced the existing strands of strict liability. *See* John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 745-60 (2001).

In a recent effort in this vein, Peter Karsten attempts to debunk the idea that proximate cause was a vibrant doctrine limiting the liability of railroads in the late 1800s. PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA 101-08 (1997). His account focuses on the aberrational decision in *Ryan v. New York Central R.R.*, 35 N.Y. 210 (1866), in which the court limited the liability of a railroad that started a fire that spread to several structures as far as 130 feet from the initial fire. *Id.* Karsten demonstrates that *Ryan* was atypical with regard to the limits on liability that it imposed and that proximate cause was neither a new nor an especially helpful defense for railroads; however, he does not address the superseding cause element of proximate cause or its significance for defendants other than railroads. *Id.*

65. *See* Smith, *supra* note 41, at 118-23.

66. For a discussion of a turn-of-the-century English case that engaged in precisely this sort of apportionment, albeit with other tortfeasors who were likely judgment proof because of their youth, *see* Rabin, *supra* note 18, at 958 n.112. Professor Rabin concurs with the view that the superseding cause doctrine is essentially a device that permits courts to void liability for a less culpable tortfeasor than the superseding cause. *Id.*

67. A wonderful example of this use of superseding cause doctrine is demonstrated in an article by Charles Carpenter, who provided us with many of the classic causal hypotheticals that are still employed in law school classrooms. He posited that a defendant negligently handed a loaded gun to a child, who then dropped it and broke a bone. *See* Charles E. Carpenter, *Proximate Cause*, 14 S. CAL. L. REV. 1, 27-28 (1940). He explained that the reason for the defendant's exoneration was that the child's dropping the gun was an unforeseeable intervening act that superseded the defendant's negligence. *Id.* *See also* RESTATEMENT (SECOND) OF TORTS § 281 cmt. f, illus. 3 (1965) (employing

This approach is evident in an early article published by Francis Bohlen, the Reporter for the first *Restatement of Torts*.⁶⁸ Criticizing a foreseeability standard as a limitation on a negligent defendant's liability, Bohlen wrote that "the wrongdoer should answer for all the consequence brought about by the working out of the injurious tendency of his wrongful act until the ordinary natural laws of cause and effect are diverted by some outside agency."⁶⁹ Throughout the article, Bohlen refers to limits on liability in the language of cause: unbroken causal chains, agents that break the causal chain, and intervening events that produce the injury to the exclusion of the defendant's tortious conduct.⁷⁰ Thus, it comes as no surprise that, when the first *Restatement of Torts* was completed and published, it made no distinction between cause in fact and limitations on liability that are today known as proximate cause. A single inquiry—"legal cause"—was the terminology of the *Restatement*, and that terminology was carried forward with but very modest changes into the *Restatement (Second) of Torts*.⁷¹

At the same time, contributory negligence by the plaintiff constituted a complete bar to recovery.⁷² Whether the contribution of the plaintiff to her own injuries was characterized as contributory negligence or as a superseding cause made no difference in the outcome, and courts occasionally employed the latter ground for denying liability when a plaintiff's unreasonable conduct was also a cause of the harm.⁷³

the same hypothetical but explaining the outcome based on the presence of harm beyond the risk created by the defendant's conduct).

Another example occurred in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), the case that swept away privity limitations, thereby creating the environment for strict products liability to develop. Concerned about the implications of the decision, Judge Cardozo expressly disclaimed that *MacPherson's* mitigation of privity would apply to anyone other than the manufacturer of the product. *Id.* at 1053. Thus, negligence by a component part manufacturer might be too remote, the manufacturer's negligence in failing to inspect constituting a "break in the chain of cause and effect." *Id.*

68. Francis Bohlen, *The Probable or the Natural Consequence as the Test of Liability in Negligence*, 49 AM. L. REG. 79, 148 (1901).

69. *Id.* at 80.

70. See *id.* at 86 ("unbroken chain of natural cause and effect"); *id.* at 149 ("outside agent destroying the chain of cause and effect"); *id.* at 158 ("[N]egligence . . . was the natural, primary and proximate cause" of the harm, despite unusual details in the manner in which the harm occurred."); *id.* at 161 ("[L]iability . . . is to be determined by the natural consequences, those resulting from the operation of the ordinary natural laws . . .").

71. See RESTATEMENT OF TORTS §§ 439-52 (1934); RESTATEMENT (SECOND) OF TORTS §§ 439-52 (1965).

72. See RESTATEMENT OF TORTS § 467 (1934); RESTATEMENT (SECOND) OF TORTS § 467 (1965).

73. There is at least one way in which the characterization might have made a difference in the outcome. The last clear chance doctrine developed as a means to ameliorate the harshness of contributory negligence. See *infra* note 130 and accompanying text. But last clear chance was only an exception to the bar of contributory negligence, not a negation of superseding causes. See *infra* notes 133-34 and accompanying text. Other ameliorative doctrines for contributory negligence would similarly be unavailable when a plaintiff's conduct was instead treated as a superseding cause. Of course, the decision to employ either contributory negligence or superseding cause may have been a function of the egregiousness of the plaintiff's conduct, with the more serious conduct being deemed a superseding cause and the less severe contributory negligence. See Wright, *supra* note 13, at 74. In

Even after contribution became established in the middle of the twentieth century, it, along with indemnity, provided relatively blunt instruments for apportioning liability when multiple defendants were involved. Contribution, until the advent of comparative fault, was based on pro rata shares—no distinction was made based on the comparative culpability of the parties.⁷⁴ Indemnity was also available, but, like pro rata contribution, it was a relatively crude instrument that shifted all of the loss to one party and left the other without liability.⁷⁵ Although indemnity was nominally limited to tortfeasors whose liability was vicarious or otherwise legally imputed, the distinction between “active” and “passive” tortfeasors developed and permitted indemnity for minor and modestly culpable defendants from those who acted more egregiously.⁷⁶ Courts used indemnity despite its technical inapplicability because it more closely reflected the relative culpability of the parties than pro rata contribution; more refined tools for apportioning liability were yet to come.⁷⁷ So long as a highly culpable tortfeasor was judgment proof, as many intentional tortfeasors are, the remaining solvent tortfeasors, regardless of their respective degrees of culpability, would be held liable for the entire harm.⁷⁸ Superseding cause for highly culpable intervening parties and no-duty rules for other instances of intentionally caused harm, concurring with negligence, provided a way to avoid the otherwise inequitable apportionment of liability that existing doctrine and the realities of insolvency might produce.

III. THE IMPACT OF COMPARATIVE RESPONSIBILITY

What changes in this legal edifice have been wrought by comparative negligence? The answer is “many,” but the difference of interest here is the diminished role for superseding cause. Before justifying that assessment, some of the more obvious consequences of comparative negligence require identification. Not only did comparative negligence remove the bar to recovery by a negligent plaintiff, it also provided a reasonably refined method for apportioning liability between a plaintiff and defendant.⁷⁹ With contribution among joint tortfeasors reasonably well-established, providing a highly graduated scale to apportion liability among defendants also provided a much refined method compared to the coarse two-unit scale of pro rata division or all-or-nothing, active-passive

that case, the ameliorative doctrines might well not have made any impact on the severely negligent plaintiff, as they were frequently employed so as to leave the more culpable party between the plaintiff and the defendant bearing the loss. *See id.* at 74 & n.72.

74. *See* PROSSER, *supra* note 53, § 48, at 278.

75. *See id.*

76. *Id.* § 48, at 279-80.

77. *See id.* § 48, at 279-81.

78. *See id.* § 48, at 280-81.

79. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 67, at 472 (5th ed. 1984). Of course, modified comparative responsibility only provides that refinement to a point, then it returns us to the crude all-or-nothing rule of contributory negligence. *Id.* § 67, at 473-74.

indemnity.⁸⁰ Modestly culpable defendants could be assigned a modest proportion of liability for the plaintiff's damages, and highly culpable defendants could be assigned a proportion of liability in keeping with their role. Indemnity no longer had to be deformed to do double duty by providing a more appropriate (if imperfect) apportionment mechanism for defendants with vastly disparate culpability than pro rata contribution offered.⁸¹

A bit less obvious, but more significant, development was the modification of joint and several liability that followed the adoption of comparative negligence. The rationale for joint and several liability was that, as between negligent defendants and an innocent plaintiff, culpable defendants should bear the risk that another would be insolvent.⁸² That rationale no longer existed when contributory negligence did not screen out all culpable plaintiffs and prevent them from recovering.⁸³ In the

80. See generally Jerry J. Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85 (1974) (discussing the relationship between contribution and indemnification); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22 cmt. e, Reporters' Note (2000) (noting that "active-passive" and "primary-secondary" indemnification "were developed before comparative responsibility [and] . . . avoided the harsh effect of pro rata contribution when one of the tortfeasors was substantially more culpable than the other").

81. A persuasive, if anecdotal, demonstration of the significance of comparative contribution occurred in *Waste Mgmt., Inc. v. S. Cent. Bell Tel. Co.*, 15 S.W.3d 425 (Tenn. Ct. App. 1997). A truck driver caught a telephone wire on his truck and pulled down a piece of a telephone pole that struck and injured the plaintiff. *Id.* at 427-28. The wire was loose because, in an earlier incident, an unknown driver had destroyed a guy wire. *Id.* at 428. The guy wire supported the telephone pole to which the telephone wire was attached, which resulted in the telephone wire's descending low enough that the truck snagged it when driving by. *Id.* In addressing the truck-defendants' contribution claim against the telephone company for permitting its wires to be below a safe height, the trial court, sitting as factfinder, concluded that the unknown driver who ruined the guy wire was "[t]he absolute most guilty party in this matter" and found the unknown driver's action to be a superseding cause of the telephone company's negligence. *Id.* at 428 n.3. (The court apparently did not appreciate that the superseding cause occurred before the telephone company's negligence that it allegedly superseded.) Shortly thereafter, the Tennessee Supreme Court decided that contribution should be determined based on comparative responsibility principles rather than on the previous pro rata basis. On post-trial motion, the court vacated its prior superseding cause finding and awarded contribution to the truck-defendants based on assignments of comparative responsibility to the truck-defendants, the telephone company, and the unidentified driver.

82. See *supra* notes 11-13 and accompanying text.

83. To be sure, some of the move away from joint and several liability was fueled by tort reform efforts and complaints about efforts to target deep pockets. The adoption of comparative fault and the loss of the rationale for joint and several liability would not justify a pure several liability scheme, even when the plaintiff was determined to be comparatively negligent, nor would it justify the modification of joint and several liability when the plaintiff was not at fault. Compare Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1125 (1989) with Richard W. Wright, *Throwing Out the Baby with the Bathwater: A Reply to Professor Twerski*, 22 U.C. DAVIS L. REV. 1147 (1989). The expansion of tort law in the latter half of the twentieth century, including the use of tort law incentives to provide better security efforts to prevent crime, no doubt contributed to the deep-pocket reform backlash. See Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 443-46 (1999); Stephen D. Sugarman, *Judges as Tort Law Un-makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 472-74.

wake of comparative fault, the majority of states have modified their rule of joint and several liability for independent tortfeasors.⁸⁴

Yet another change wrought by the availability of a comparative methodology for apportionment of liability is the willingness of many courts to include intentional tortfeasors with other tortfeasors in the assessment of comparative responsibility.⁸⁵ Thus, when negligent tortfeasors concur with

84. States have adopted a variety of systems that entail hybrids of joint and several liability, depending on thresholds of comparative fault, types of claims, types of damages, and other factors. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 cmt. a (2000). Only ten jurisdictions with comparative negligence regimes retain joint and several liability. *Id.* § 17 cmt. a, Reporters' Note.

85. The *Restatement (Third) of Torts: Apportionment of Liability* identifies ten jurisdictions that have approved comparing intentional tortfeasors with other nonintentional tortfeasors and five that have refused to do so. *Id.* § 1 cmt. c, Reporters' Note. A post-*Restatement* case declining to permit apportionment between a negligent defendant and a nonparty intentional tortfeasor is *Brandon v. County of Richardson*, 624 N.W.2d 604, 620 (Neb. 2001). Many of the five jurisdictions that declined to permit comparative apportionment among negligent and intentional tortfeasors felt constrained, in varying degrees, by the state's comparative fault statute. See, e.g., *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 282 (5th Cir. 1998) (holding that Mississippi's comparative fault statute, which explicitly excludes intentional tortfeasors, bars assignment of comparative responsibility to such tortfeasors).

Some jurisdictions with several liability have declined to permit comparative apportionment between an intentional tortfeasor and a negligent tortfeasor in a narrow context that does not speak to the more general proposition. These cases involve a defendant who was negligent precisely because of the risk of an intentional tort and the defendant's failure to take adequate precautions to protect the plaintiff from this risk. In a jurisdiction with several liability, permitting comparative apportionment between these defendants would often reduce the negligent defendant's liability to a fraction of the damages for the harm, thereby removing a great deal of the incentive to adopt the adequate security precautions intended by the tort obligation in the first place. See, e.g., *Bhinder v. Sun Co.*, No. CV960153767, 2001 WL 1284143 at *4-*6 (Conn. Super. Ct. Oct. 9, 2001) (applying legislation enacted after a prior decision which had held that responsibility could be apportioned between a criminal who shot plaintiff's decedent to death and defendant which failed to provide adequate security to protect against criminal activity at a twenty-four-hour convenience store); *Kan. State Bank & Trust Co. v. Specialized Transp. Servs., Inc.*, 819 P.2d 587, 606 (Kan. 1991) ("Negligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another that they had a duty to prevent."); *Veazey v. Elmwood Plantation Assocs., Ltd.*, 650 So. 2d 712, 719 (La. 1994) ("As a general rule, we find that negligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another that they had a duty to prevent."); *Posecai v. Wal-Mart Stores, Inc.*, No. 98-CA-1013, 1999 WL 199296, at *14 (La. Ct. App. Mar. 30, 1999) (holding that because negligent defendant breached duty to protect plaintiff from criminal act, no apportionment to armed robber was permitted); *McLean v. Kirby Co.*, 490 N.W.2d 229, 242-43 (N.D. 1992) (permitting negligent defendant to reduce liability based on rapist's comparative responsibility would be neither fair nor just); *Brandon*, 624 N.W. 2d at 620 (expressing the concern that it would be "irrational" to permit a defendant, negligent for failure to protect against the risk of criminal assault, to reduce liability based on that criminal assault); *Wal-Mart Stores, Inc. v. McDonald*, 676 So. 2d 12, 21 (Fla. Dist. Ct. App. 1996) ("The public policy underlying our construction of [the comparative responsibility statute] is that negligent tortfeasors such as Wal-Mart and Merrill Crossings should not be permitted to reduce their fault by shifting it to another tortfeasor whose intentional, criminal conduct was a foreseeable result of their negligence."); *Slawson v. Fast Food Enters.*, 671 So. 2d 255, 258 (Fla. Dist. Ct. App. 1996).

On the one hand Burger King owed a duty to protect [the victim, a patron] from foreseeable intentional assaults by other patrons; but on the other hand, Burger

intentional tortfeasors to cause harm to another, liability is often apportioned among the defendants based on comparative responsibility principles. Thus, comparative contribution becomes available even when an intentional tortfeasor concurs with other nonintentional tortfeasors to cause harm in a joint and several liability jurisdiction. Additionally, in a jurisdiction with several liability, the negligent tortfeasor's liability is limited to its comparative share of the damages.⁸⁶

Comparative fault and comparative contribution recognize the reality that many tortious acts may concur to cause the same harm. While recognizing that reality, comparative methodology also provides a mechanism for apportioning liability for the harm among all of the tortfeasors in some rough approximation to the culpability of each.

IV. CONTEMPORARY PROXIMATE CAUSE LIMITS ON SCOPE OF LIABILITY

To complete the setting for this discussion of the impact of comparative responsibility on superseding cause, I consider existing legal limits on the scope of a tortfeasor's liability. I address here limits that the law imposes even when tortious conduct is the factual cause of cognizable legal harm. That there must be some limit to the liability of a tortfeasor whose conduct causes harm is unexceptional. We cannot imagine holding Eve liable for all of the harm that has occurred since humankind was turned out of the Garden of Eden. Factual causal chains can extend in extraordinary and fortuitous ways, and limits there must be. No-duty rules and proximate cause are the two doctrinal means by which those limits have been accomplished. While there is considerable overlap, I leave aside no- and limited-duty rules, which are questions of law decided by courts and, most frequently and appropriately, consist of specific, clear rules that apply to categories of cases or classes of actors. Thus, the provision that there is no duty to rescue eliminates liability for all of those whose actions did not contribute to creating the risk that imperils another. Proximate cause limits, by contrast, are dependent on the specific facts of a case and, unlike duty limitations, are decided by the fact-finder.

King contends, it is entitled . . . to diminish or defeat its liability for the breach of that duty by transferring it to the very intentional actor it was charged with protecting her against.

Id.; *Prime Hospitality Corp. v. Simms*, 700 So. 2d 167, 169 (Fla. Dist. Ct. App. 1997) (affirming principle of *Slawson*).

Declining to permit comparative apportionment in this situation so as to, in effect, negate the provision for several liability and to make the negligent tortfeasor jointly and severally liable does not speak to the desirability of comparative apportionment between intentional and negligent tortfeasors outside of the failure-to-protect context. An alternative means to accomplish the goal sought by the courts that refuse to permit comparative apportionment in this context is to make a tortfeasor who failed to protect against an intentional tort liable not only for the former's comparative share of responsibility but also for the latter's. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 (2000). Significantly, for the thesis of this Essay, the courts that have refused to permit apportionment to an intentional tortfeasor for this reason are doing so to *expand* the liability of the negligent tortfeasor who failed to protect, not to contract it.

86. See KEETON ET AL., *supra* note 79, § 67, at 475.

While there are multiple approaches to the proximate cause problem of imposing workable limits on a defendant's liability,⁸⁷ the predominant one employed today requires that the harm for which a plaintiff seeks to recover be one of the harms whose risk made the defendant's conduct tortious.⁸⁸ In a negligence case, in which a defendant is only required to anticipate and to take precautions against foreseeable harms, that limit becomes one that requires that the risk of harm suffered by the plaintiff be reasonably foreseeable at the time of the defendant's negligence. The defendant's liability extends to harms that came to fruition as a result of risks that made the defendant's failure to take greater care negligent. Thus, the risk standard limits liability to harms that were within the purview of the reason for holding the defendant liable in the first place. These same limits also apply to plaintiff's negligence. Even if the plaintiff's contributory negligence is a factual cause of harm, the harm must be among the harms whose risks made the plaintiff's conduct negligent. Otherwise, the plaintiff's negligence is not a proximate cause of harm and should have no effect on the parties' respective liability for the plaintiff's damages.

However, foreseeability, even when anchored to the time when the defendant acted and to the harms that might have been anticipated to result from the deficient conduct, leaves some proportion of cases indeterminate. Reasonable people might well resolve these cases in different ways or might candidly confess that they have little clue about how the case should be resolved. This indeterminacy provides courts considerable leeway to characterize an intervening event in a preferred

87. See DOBBS, *supra* note 17, § 180, at 444 (2000) ("The most general and pervasive approach to proximate cause holds that a negligent defendant is liable for all the general kinds of harms he foreseeably risked by his negligent conduct and to the class of persons he put at risk by that conduct."); see also 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 20.5, at 138 (2d ed. 1986)

The view currently prevailing in this country, however, does limit the scope of the duty to do or refrain from doing a given act to (1) those persons that are likely to be endangered by the act or omission, and (2) harm (to such person or interest) from a risk the likelihood of which made the act or omission negligent.

KEETON ET AL., *supra* note 79, § 43, at 297 ("[T]he conclusion may well be drawn that . . . the 'scope of the foreseeable risk' is on its way to ultimate victory as the criterion of what is 'proximate,' if it has not already achieved it.").

88. However, I say this with some caution. Often, one can find strands of a direct/remote test and a hindsight foreseeability test, the predominant alternatives to a harm-within-the-risk standard, in the same judicial opinion, without any acknowledgment of a difference among these three rules. See, e.g., *Dura Corp. v. Harned*, 703 P.2d 396, 402 (Alaska 1985) (using hindsight foreseeability and scope of the foreseeable risk); *Salem v. Superior Court*, 259 Cal. Rptr. 447, 453 (Ct. App. 1989) (applying foreseeability and remote-consequences language to deny recovery in a dramshop case); *Stahl v. Metro. Dade County*, 438 So. 2d 14, 19 (Fla. Dist. Ct. App. 1983) (equating harm within the risk to extraordinary or bizarre outcomes); *Galbreath v. Eng'g Constr. Corp.*, 273 N.E.2d 121, 129 (Ind. Ct. App. 1971) (using remote versus direct and event within bounds of foreseeability in proximate cause analysis).

fashion⁸⁹ and thereby to rule as a matter of law, although the clear trend has been to leave resolution of these questions to the fact-finder.

A second aspect to proximate cause limits on liability is that the harm must be one whose risks were increased by the tortious or negligent aspect of the defendant's conduct. Although the harm may have been foreseeable and the defendant's negligence a factual cause of the harm, the connection between the negligence and the harm may be one of pure fortuity. A speeding driver struck by lightning that propels the speeding car into another's would not have been in the precise location where lightning struck if the driver were complying with speed limits. Yet, the risks of harm created by speeding had no role in causing the injury to the other car. But for the random timing of the lightning, the speed at which the plaintiff was driving was irrelevant to the harm. The risk of this particular type of accident is unaffected by whether the driver was complying with the speed limit.⁹⁰

These limitations on liability remain unaffected by the advent of comparative fault. These rules are purely about the scope of a tortfeasor's liability and unlike superseding cause doctrine do not implicate issues of apportioning liability when there are multiple persons whose tortious acts caused the plaintiff's harm. To put the point differently, limiting liability to harms among the risks created by the defendant's conduct is as appropriate when there is a single potential tortfeasor that caused the harm as when there are multiple such actors involved.

Superseding cause rules supplement the limits sketched out above. Especially among courts that employ direct/remote language for proximate cause, the number and quality of intervening causes that can be identified bear strongly on the assessment of whether the harm is too "remote" for liability to be imposed.⁹¹ Even courts that employ a risk or foreseeability standard find additional limitations on liability in the doctrine of superseding causes.⁹²

89. See *Hines v. Joy Mfg. Co.*, 850 F.2d 1146, 1152 (6th Cir. 1988) (interpreting Kentucky products liability statute as barring liability if product alteration is a cause of the injury); *Hanlon v. Cyril Bath Co.*, 541 F.2d 343, 345 (3d Cir. 1975); DOBBS, *supra* note 17, § 190, at 472 (discussing cases in which courts declared intentional conduct unforeseeable); Kelley, *supra* note 36, at 92-93.

90. One might reformulate this limitation on liability as an aspect of factual cause. Judge Keeton urged that if the tortious act was described based on the risks that it created, limits on liability could be performed with a factual cause analysis. See ROBERT E. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* (1963). Thus, the risks created by the speeding driver were that he would lose control or would not be able to avoid other traffic or pedestrians. See *id.* The risks posed by the driver's excessive speed thus were not a factual cause of the harm. *Id.*

91. See, e.g., *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1879); *Pittsburgh Forge & Iron Co. v. Dravo Contracting Co.*, 116 A. 147, 149 (Pa. 1922) (noting that the facts must "show a continuous succession of events" for a result to be considered "the natural one"); McLaughlin, *supra* note 38, at 157-60 (describing proximate cause in terms of intervening acts that render the defendant's conduct remote as opposed to direct).

92. See, e.g., *Cascone v. Herb Kay Co.*, 451 N.E.2d 815, 819 (Ohio 1983) (discussing "new and independent" acts which "absolve[] the original negligent actor"); *Doe v. Linder Constr. Co.*, 845 S.W.2d 173, 182 (Tenn. 1992) (holding that a rapist was superseding cause of defendant-developer's negligence in leaving keys for all homes in an uncompleted development in a central location where construction employees had access). A frequently expressed principle of proximate cause is that the manner in which the harm occurs has no bearing on the outcome. See RESTATEMENT (SECOND) OF

In the middle of the twentieth century, the law regarding superseding causes evolved considerably to accommodate the expansion of liability theories and of the duty to take precautions against third-party negligent and intentional conduct.⁹³ When the sole source of the risk consisted of third-party conduct and tort law expanded the obligation of merchants, landlords, employers, and other enterprise actors capable of preventing harm caused by the criminal acts of others, superseding cause law necessarily conformed. An innkeeper with a duty to take reasonable care to prevent physical attacks on guests cannot be relieved of liability on proximate cause grounds when precisely the risk that the innkeeper was to take precaution against comes to fruition and harms the plaintiff. To take away with superseding cause what tort law has increasingly established in recent decades by expanding duty concepts would be like purchasing a car with optional side air bags and then removing them.

Courts have readily resolved such cases by observing that a foreseeable intervening act is not a superseding cause.⁹⁴ That rule, in widespread use, is benign in cases in which the intervening act created precisely the risk against which the defendant was to protect. But it may be misleading because in some cases it fails to focus on the matter of importance. When the foreseeable, intervening act is the source of the risk—a criminal, for instance—the harm that results will be the harm whose risk—the intervening act—made the defendant negligent. However, what about the situation in which the intervening act is not reasonably foreseeable—a standard sufficiently malleable that it arises with frequency—but the harm that occurs is harm of the sort against which the defendants failed reasonably to protect? Thus, a contractor excavating in the middle of a sidewalk has a duty of care to prevent pedestrians from falling into the excavation. Does breach of that obligation also result in liability when a careless pedestrian does not see the excavation or when a mugger pushes a victim into the hole? A product manufacturer must design its product to make it reasonably safe. Does the manufacturer's liability extend to harm caused by an uncrashworthy design that concurs with another's road rage to cause the plaintiff harm? Does the answer to this question turn on the foreseeability of road rage? It is to these sorts of cases that I turn.

TORTS § 281 cmt. c, illus. 2 (1965); *see also id.* § 435(1) (“[T]he fact that the actor neither foresaw nor should have foreseen . . . the manner in which [the harm] occurred does not prevent him from being liable.”); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 29 cmt. o (Tentative Draft No. 2, 2002). A risk standard for limiting liability in conjunction with this principle should diminish the role of intervening acts for purposes of limiting liability. *See* HART & HONORÉ, *supra* note 57, at 287; DOBBS, *supra* note 17, § 189, at 469-70.

93. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 19 (Tentative Draft No. 1, 2001); Rabin, *supra* note 83, at 435.

94. *See, e.g.,* *Stagl v. Delta Airlines, Inc.*, 52 F.3d 463, 473-74 (2d Cir. 1995); *Bell v. Bd. of Educ.*, 687 N.E.2d 1325, 1326 (N.Y. 1997); *Harris v. Utah Transit Auth.*, 671 P.2d 217, 219 (Utah 1983); *see also* Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 998-1000 (2001).

V. THE END OF SUPERSEDING CAUSES?

The first incursion by comparative responsibility on superseding causes is that courts can no longer use a plaintiff's conduct alternatively as a superseding cause or contributory negligence.⁹⁵ When both superseding cause and contributory negligence had the same effect on the outcome of the case, such alternative use, while imprecise, had no effect on the outcome—the plaintiff lost.⁹⁶ With comparative responsibility, the negligent plaintiff no longer loses, and courts can no longer afford to characterize a plaintiff's negligence that merely concurs with the defendant's negligence to cause harm as a superseding cause.⁹⁷

Let us reconsider one of the cases with which this Essay began. Recall that in *Baker v. International Harvester Co.*, the plaintiff's decedent was hunting after hitching a ride on a combine being operated by another.⁹⁸ After the driver observed the hunter on the combine, he began to stop the combine to request that the hunter leave.⁹⁹ In the interim, the hunter fell off of the combine and was killed.¹⁰⁰ Plaintiff presented evidence of three different design defects and also claimed that a better warning of the dangers of riding on the combine should have been provided.¹⁰¹ Declining to address these claims, the court affirmed the trial court's directed verdict for the defendant on the ground that riding the combine with a gun for hunting without the knowledge of the operator was neither intended nor foreseeable and therefore constituted an abnormal use that barred recovery.¹⁰²

Perhaps the court concluded that the combine was as safe as it was required by law to be and therefore was not defective. That proposition seems dubious, based on the language the court employed, its indifference to the design defect claims propounded by the plaintiff, and its failure to engage in an assessment of the risks

95. Interestingly, the first case identified as invoking proximate cause to deny recovery, *Flower v. Adam*, 127 Eng. Rep. 1098 (1810), concluded that the lack of skill of the plaintiff-rider in controlling his horse in a dust storm attributed to the defendant's nuisance was the proximate cause of the plaintiff's injuries. See generally Christopher Dove, Note, *Dumb as a Matter of Law: The "Superseding Cause" Modification of Comparative Negligence*, 79 TEX. L. REV. 493 (2000).

96. The *Second Restatement* carefully distinguished between the acts of the plaintiff and the acts of third parties in defining superseding causes. See RESTATEMENT (SECOND) OF TORTS § 440 (1965) ("[A] superseding cause is an act of a *third person* or other force which by its intervention prevents the actor from being liable for harm to *another* which his antecedent negligence is a substantial factor in bringing about.") (emphasis added). The *Restatement* did include several specific instances in which it declared that certain conduct, including a plaintiff's, was not a superseding cause of harm. *Id.* §§ 444-46.

97. For cases in which courts continue to employ superseding cause doctrine with regard to a plaintiff's conduct, see Dove, Note, *supra* note 95, at 503-30.

98. *Baker v. Int'l Harvester Co.*, 660 S.W.2d 21, 22 (Mo. Ct. App. 1983).

99. *Id.* at 23.

100. *Id.*

101. *Id.*

102. *Id.* Superseding cause determinations in products liability cases are sometime put in terms of substantial change, based on the language of § 402A, or misuse. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. m (1998).

that existed in the combine when someone rode along on it.¹⁰³ Indeed, it appears the court meant what it said—plaintiff's decedent's riding a combine without permission or knowledge of the operator to hunt was a behavior that barred him from recovery.¹⁰⁴

The difficulty with this conclusion is that it sounds like the court has ruled that contributory negligence bars the plaintiff's claim as a matter of law. But contributory negligence was not a defense in Missouri to a strict products liability case at the time of *Baker*.¹⁰⁵ Therefore, superseding cause became the surrogate basis for barring the plaintiff's claim. But should it have?

That depends on whether the combine posed risks of a rider falling off that reasonably could have been ameliorated by a design change.¹⁰⁶ I do not know how often there are riders on combines and the frequency with which they fall off and are injured, but I am inclined to doubt that the risk was substantial enough to warrant modification of the machine. Be that as it may, there is some substantial possibility that a jury, after the evidence on this matter is developed, should be the entity making that decision. Of course, if the product is exonerated, we need not consider the role of the plaintiff's actions. But if the combine were found to pose unacceptable danger to riders, then we must account for the plaintiff's behavior. The *Baker* court's decision barring the claim evaded Missouri law that contributory negligence was not a defense in a strict liability action.¹⁰⁷ Once comparative fault was made applicable to strict products liability suits, the fact that the plaintiff's actions were foolish, risky, and unneighborly would certainly justify a comparative fault instruction, but not a superseding cause resolution.¹⁰⁸

One might object that permitting lawsuits by egregiously culpable plaintiffs to recover a small fraction of their harm is not good public policy—the transaction costs of such claims are simply not worth whatever benefits such suits may provide. Moreover, egregiously culpable plaintiffs are undeserving of any recompense by other, less culpable wrongdoers. That objection has some currency, but is

103. See *Baker*, 660 S.W.2d at 23.

104. *Id.*

105. See *Lippard v. Houdaille Indus., Inc.*, 715 S.W.2d 491, 493 (Mo. 1986) (en banc). Missouri enacted a comparative fault statute applicable to strict products liability actions in 1987. MO. ANN. STAT. § 537.765 (West 1987).

106. The answer also depends on whether the dangers posed by the combine were beyond the expectations of a reasonable consumer or user of the combine, in a consumer expectations jurisdiction.

107. See *supra* note 105 and accompanying text.

108. A sometimes employed proxy for superseding cause, sole proximate cause, raises the same issue as to the appropriateness of applying it to a plaintiff's conduct once comparative responsibility is enacted. See *Everly v. Columbia Gas of W. Va., Inc.*, 301 S.E.2d 165, 166-68 (W. Va. 1983).

In *Alami v. Volkswagen of America, Inc.*, 766 N.E.2d 574 (N.Y. 2002), the court reversed a judgment for defendant in a crashworthiness claim. Plaintiff's decedent was intoxicated, which caused the car to crash. The lower court held that decedent's intoxication was the sole proximate cause of the death. The court appreciated that both the intoxication and a defective condition in the car could have been factual causes of the death. The court then went on to observe that to bar the plaintiff from recovery because of the serious misconduct of the decedent would be inconsistent with comparative fault principles.

substantially undercut for three reasons. As a practical matter, a small percentage of anything but very substantial damages will not be an attractive lawsuit for a contingent-fee lawyer. Second, the comparative fault systems largely extant today are modified systems, which generally impose a threshold of the plaintiff being assigned no more than fifty percent of the comparative responsibility.¹⁰⁹ This threshold already overperforms the function of excluding egregiously culpable plaintiffs. Even in those jurisdictions that have pure comparative fault, a rule that denies recovery unless a plaintiff is below a certain low threshold—say fifteen percent—better responds to the administrative cost objection than applying superseding cause as a surrogate to screen cases that are not thought to be worth the efforts to process. Finally, if we truly believe that egregiously more culpable parties should bear responsibility for all damages, we would need, reciprocally, a doctrine that a plaintiff's modest comparative responsibility is ignored when a defendant is found largely responsible.

The Supreme Court's decision in *Exxon Co., U.S.A. v. Sofec, Inc.*,¹¹⁰ an admiralty case, appears to contradict the position advocated here. The owner of a tanker sued a mooring facility (and related parties), alleging the defendants' negligence caused the loss of the ship.¹¹¹ At trial, the court, sitting as fact-finder, determined that the lapses by the tanker's captain constituted gross negligence and that one particularly egregious steering decision was "unforeseeable."¹¹² On appeal, the plaintiff argued that with the adoption of comparative responsibility in admiralty actions, proximate cause and superseding cause were unnecessary and should be abandoned.¹¹³ Apparently, plaintiff argued that all proximate cause limitations should be displaced once comparative responsibility was in place, not just superseding cause.¹¹⁴ That extreme position¹¹⁵ distracted attention from the more

109. See KEETON ET AL., *supra* note 79, § 67, at 473.

110. 517 U.S. 830 (1996).

111. *Id.* at 834.

112. *Id.*

113. *Id.* at 835.

114. *Id.* at 835-36. The Court provides conflicting statements about whether the plaintiff made the limited argument that only superseding cause was displaced by comparative responsibility or argued that all proximate cause limitations on liability should be discarded. *Compare id.* at 836 (stating that the plaintiff argued "superseding cause doctrine . . . should not apply in admiralty") with *id.* (stating that the plaintiff's "argument [was] that the proximate cause requirement, and the related superseding cause doctrine . . . should not be applicable in admiralty"). Those are very different arguments. Petitioner's briefs largely focused on superseding cause. See Petitioners' Brief on the Merits at 29-32, *Sofec* (No. 95-129). But petitioner also asserted that so long as a party's negligence was a factual cause of the harm, apportionment based on comparative responsibility was required, and petitioner further argued that all proximate cause limits should be discarded because of the confusing nature of the doctrine. See *id.* at 29; Petitioners' Reply Brief on the Merits at 9, *Sofec* (No. 95-129). Hence, the petitioners' raised the question of whether any proximate cause limits survived the adoption of comparative responsibility.

Apparently, the reason that proximate cause was involved in *Sofec*, in addition to superseding cause, was that the trial court, after concluding that the plaintiff's captain's negligence was a superseding cause, gilded the lily by also finding that the captain's acts were the sole proximate cause of the harm. *Sofec*, 517 U.S. at 835. Once the court concluded that the captain's negligence was a

modest and more persuasive claim: superseding cause limitations of liability that go beyond the basic limitations imposed by proximate cause are inappropriate once comparative responsibility and comparative contribution are available as liability apportioning devices. A substantial portion of the *Sofec* Court's opinion is devoted to justifying the unexceptional proposition that proximate cause limitations on liability remain necessary despite apportionment based on comparative responsibility.¹¹⁶ But the Court also rejected the plaintiff's claim that rules of superseding cause should be eliminated.¹¹⁷ Admiralty decisions by the Court, of course, are not binding on state courts which decide their own tort law, but Supreme Court decisions in admiralty tend to cast a significant shadow on state tort law.¹¹⁸

Yet, I think that a plausible reading of *Sofec* renders it not inconsistent with the position that comparative fault does affect the invocation of superseding cause both as applied to plaintiffs' conduct as well as to third-party conduct. In any case, the Court's reasoning in reaching the conclusion that superseding cause remains unaffected by comparative responsibility, as explained below, is not compelling.

Sofec entailed negligence by a mooring facility that enabled the plaintiff's oil tanker to escape its mooring.¹¹⁹ However, the captain of the ship was aboard at the time, and after successfully avoiding hazards created by the escape, he maneuvered the ship out to sea.¹²⁰ At that point the captain was negligent in several aspects in navigating the ship and failed to ascertain the ship's position.¹²¹ As a result, the ship ran aground on a reef and sustained severe damage that resulted in a complete loss of the ship.¹²²

One can read *Sofec* as a case in which the risk of the captain's failure to ascertain the ship's position was unaffected by the defendant's negligence in mooring the ship. By that I mean that none of the risks that made the mooring company's conduct negligent came to fruition. To illustrate, let me change the facts of *Sofec* so that after the oil tanker escaped, the captain decided that, rather than returning to the mooring facility, he would proceed with the load of cargo to the destination at which he would have arrived the following day. During the trip, a freak storm developed and destroyed the ship. While the mooring company's

superseding cause, the sole proximate cause conclusion necessarily followed and contributed no additional basis for the outcome. *Id.*

115. *See supra* notes 86-92 and accompanying text.

116. *Sofec*, 517 U.S. at 836-39.

117. *Id.*

118. The Supreme Court's decision in *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 876 (1986), holding that damage to the product itself is economic loss and outside the scope of recovery in tort under admiralty law, has been quite influential among state courts. *See, e.g.*, *Coop. Power Ass'n v. Westinghouse Elec. Corp.*, 493 N.W.2d 661, 667 (N.D. 1992) (adopting the rationale of *East River Steamship*); MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 644 (7th ed. 2001) (discussing state courts' widespread acceptance of *East River Steamship*); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 21 cmt. d, Reporters' Note (1998) (same).

119. *Sofec*, 517 U.S. at 832-33.

120. *Id.* at 833.

121. *Id.* at 833-34.

122. *Id.* at 834.

negligence was a factual cause of the harm, it was not a proximate cause because the risks that made it negligent did not include a freak storm. Its negligence in relation to the harm is the same as the speeding driver struck by lightning.¹²³

On this account of the *Sofec* case, the defendant's negligence was merely coincidental with the captain's navigational defaults.¹²⁴ To the extent *Sofec* can be read as limited to requiring that an actor's tortious conduct increase generally the risk of the harm that subsequently occurs, it is consistent with the proximate cause limits that must exist in any case.¹²⁵ However, the *Sofec* Court did not explicitly limit its decision in that fashion, and language in the opinion goes beyond the limited reading of the case set forth above.

The *Sofec* Court's reasoning on superseding causes is not persuasive. Aside from the Court's rejection of the petitioners' argument for eliminating proximate cause entirely, it provided a single reason for retaining superseding cause limitations on liability—they are neither internally inconsistent nor repugnant to comparative responsibility.¹²⁶ While that may be true, this

123. See *supra* note 90 and accompanying text.

124. The trial judge found, and the Court reiterated, albeit in denying plaintiff's contention, that the trial court's findings of fact on superseding cause were clearly erroneous and that "the captain's failure to plot fixes . . . 'was entirely independent of the fact of breakout.'" *Sofec*, 517 U.S. at 841 n.3.

125. For an analysis of *Sofec* similar to that above, see DOBBS, *supra* note 17, § 196, at 490; cf. *Wolfe v. Stork RMS-Protecon, Inc.*, 683 N.E.2d 264, 268 (Ind. Ct. App. 1997) (holding that a manufacturer of a conveyor system was not liable on proximate cause grounds when a subsequent modification of the system created the risk that harmed the plaintiff, despite a prior decision of the court that comparative fault obviated the use of superseding cause).

126. To be precise, the not "internally inconsistent" claim was specifically attributed to proximate, rather than superseding, cause. *Sofec*, 517 U.S. at 837. Because of the similarity between inconsistency and repugnancy, I reiterate and treat both here as about superseding cause.

The Court also cited and quoted an admiralty treatise that made the same claim, albeit in conclusory terms: "[T]he superseding cause doctrine can be reconciled with comparative negligence. Superseding cause operates to cut off the liability of an admittedly negligent defendant, and there is properly no apportionment of comparative fault where there is an absence of proximate causation." *Id.* at 837-38 (quoting THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 5-3, at 166 (2d ed. 1994)).

The Court also stated, relying on the defendants' brief, that of the forty-six jurisdictions adopting comparative fault, forty-four retained superseding cause. *Sofec*, 517 U.S. at 838. The statement is incorrect. While I have not canvassed every jurisdiction, the latest draft of the *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)* § 33 cmt. c, Reporters' Note (Tentative Draft No. 2, 2002) cites opinions decided before *Sofec* in 1996 from seven jurisdictions that recognize the impact of comparative responsibility on superseding cause. A leading treatise on comparative responsibility identifies several other jurisdictions in which the author concludes that the court was influenced by the availability of comparative responsibility to diminish the scope of superseding cause. See SCHWARTZ, *supra* note 23, § 4-3(a), at 93-95 (describing several cases in which the adoption of comparative fault influenced the court to expand liability to a defendant who was only marginally responsible); see also HENRY WOODS, *THE NEGLIGENCE CASE: COMPARATIVE FAULT* § 5:1, at 94 (1978) (observing that while comparative responsibility should not affect proximate cause, it might result in courts being more lenient on superseding cause). In addition, a very good student note that both discussed the difference between proximate cause and superseding cause and explained why the latter should not survive adoption of comparative responsibility went unrecognized and uncited by the Court (and the parties). See generally Christlieb, *supra* note 23.

The fifty-one cases cited in the defendants' brief and relied on by the Court are underwhelming

is support of the proposition for which the court referred to them: forty-four states continue to recognize and use superseding cause since their adoption of comparative fault. *Sofec*, 517 U.S. at 837-38. In forty-two of the cases (identified below), the Court never considered the issue of the compatibility of superseding cause with comparative responsibility. In twenty-three of those cases, there was some potential superseding cause to which the Court referred, and the case was one in which comparative responsibility was available and could have been assigned to the potential superseding cause. However, in nineteen of these cases, the superseding cause was an immune or a non-party and thus not eligible for assignment of comparative responsibility under the rules then in existence in those jurisdictions.

In two other cases, neither comparative fault nor superseding cause were issues before the court. One case was decided when contributory negligence was still the governing law. Thus, only six cases contain explicit discussions of the possible effects of comparative negligence on superseding cause. One of these confines that discussion to the narrow facts of custodial suicide cases.

I find it astonishing that the United States Supreme Court would accept so uncritically the contents of an adversary's brief and employ it in support of its decision and for the implicit proposition that forty-four of forty-six jurisdictions rejected the petitioners' claim with what had to be no independent review of the brief. The cases are broken up by category below.

I. Courts confronting a case with superseding cause and comparative fault, but the possible superseding cause in the case could not be assigned comparative fault, either because it was immune or was a non-party.

Lake v. Constr. Mach., Inc., 787 P.2d 1027 (Alaska 1990); *Brewer v. Teano*, 47 Cal. Rptr. 2d 348 (Ct. App. 1995) (but note that court uses a superseding cause analysis where the case could be decided on no proximate cause grounds); *Heritage Vill. Master Assoc., Inc. v. Heritage Vill. Water Co.*, 622 A.2d 578 (Conn. App. Ct. 1993) (but note that the superseding causes were inanimate "corrosive forces," and the court uses a superseding cause analysis to find that the possible superseding cause was not a cause-in-fact of the plaintiffs' harm); *Duphily v. De. Elec. Coop., Inc.*, 662 A.2d 821 (Del. 1995); *Gafford v. Duncan*, 436 S.E.2d 78 (Ga. Ct. App. 1993) (but note court uses a superseding cause analysis where the case could be decided on no proximate cause grounds); *Orthman v. Idaho Power Co.*, 895 P.2d 561 (Idaho 1995) (but note state defines a superseding cause as an unforeseeable third party, so defendant's assertion that plaintiff could be superseding cause cannot work for that reason); *Barkley v. Freeman*, 827 P.2d 774 (Kan. Ct. App. 1992) (but note court uses a superseding cause analysis where the case could be decided on no proximate cause grounds); *Solimene v. Grauel & Co.*, 507 N.E.2d 662 (Mass. 1987); *O'Cain v. Freeman & Sons, Inc.*, 603 So. 2d 824 (Miss. 1991); *Foster v. Bass*, 575 So. 2d 967 (Miss. 1990) (comparative fault possible, but court finds one of two defendants to have no duty to the plaintiff; court states that even if that defendant had a duty to the plaintiff, the other defendant's acts would be a superseding cause of plaintiff's harm); *Buck v. Union Elec. Co.*, 887 S.W.2d 430 (Miss. Ct. App. 1994); *Merrick v. Thomas*, 522 N.W.2d 402 (Neb. 1994) (potential superseding cause was dismissed from case after summary judgment); *Doud v. Las Vegas Hilton Corp.*, 864 P.2d 796 (Nev. 1993); *Davis v. Brooks*, 655 A.2d 927 (N.J. Sup. Ct. App. Div. 1993); *Sarracino v. Martinez*, 870 P.2d 155 (N.M. Ct. App. 1994); *Shahzaman v. Green Bus Lines Co.*, 625 N.Y.S.2d 631 (App. Div. 1995); *Bruns v. Cooper Indus., Inc.*, 605 N.E.2d 395 (Ohio Ct. App. 1992); *Haynes v. Hamilton County*, 883 S.W.2d 606 (Tenn. 1994); *Lynch v. Norton Constr., Inc.*, 861 P.2d 1095 (Wyo. 1993).

II. Cases in which comparative fault could be applied to the original actor and the superseding actor, and in which the court also contemplated the latter could be a superseding cause.

LaVoie v. Pac. Press & Shear Co., 975 F.2d 48 (2d Cir. 1992); *Carroll Elec. Coop. Corp. v. Carlton*, 892 S.W.2d 496 (Ark. 1995) (note that court uses superseding cause analysis to conclude that one act is not a cause-in-fact of plaintiff's harm); *Petolicchio v. Santa Cruz County Fair & Rodeo Assoc., Inc.*, 866 P.2d 1342 (Ariz. 1994); *Smith v. Johnson*, 899 P.2d 199 (Ariz. Ct. App. 1995); *Voight v. Colo.*

Mountain Club, 819 P.2d 1088 (Colo. Ct. App. 1991); Palm Beach County Bd. of County Comm'rs v. Salas, 511 So. 2d 544 (Fla. 1987); Roseberry v. Brooks, 461 S.E.2d 262 (Ga. Ct. App. 1995) (plaintiff could be assigned fault, but the court does not discuss this option; court finds plaintiff to be a superseding cause of her own harm); Leary v. Poole, 705 P.2d 62 (Haw. Ct. App. 1985); Hagen v. Texaco Ref. & Mktg., 526 N.W.2d 531 (Iowa 1995); Ames v. Dipietro-Kay Corp., 617 A.2d 559 (Me. 1992); Hafner v. Iverson, 343 N.W.2d 634 (Minn. 1984); Anderson v. Neb. Dept. of Soc. Servs., 538 N.W.2d 732 (Neb. 1995) (comparative fault not considered; one of two possible superseding causes is a non-party, the other is the plaintiff); Weldy v. Town of Kingston, 514 A.2d 1257 (N.H. 1986); Powell v. Drumheller, 653 A.2d 619 (Pa. 1995); Hicks v. Met. Ed. Co., 665 A.2d 529 (Pa. Commw. Ct. 1995); Walsh v. Israel Couture Post, 542 A.2d 1094 (R.I. 1988); Holmes v. Wegman Oil Co., 492 N.W.2d 107 (S.D. 1992); City of Lancaster v. Chambers, 883 S.W.2d 650 (Tex. 1994); Venetoulis v. O'Brien, 909 S.W.2d 236 (Tex. App. 1995); Cramer v. Dept. of Hwys., 870 P.2d 999 (Wash. Ct. App. 1994) (note that one possible superseding cause is the plaintiff, the other is a non-party, and the court does discuss including the non-party's fault in calculating damages); Wehner v. Weinstein, 444 S.E.2d 27 (W.Va. 1994); Voight v. Reisterer, 523 N.W.2d 133 (Wis. Ct. App. 1994); McCorvery v. Utah State Dept. of Transp., 868 P.2d 41 (Utah 1993).

III. Superseding cause and comparative fault in case, with some discussion of comparative fault's impact on superseding cause.

Benner v. Bell, 602 N.E.2d 896, 901 (Ill. App. Ct. 1992) (court considers whether comparative fault should mean that "a remote cause can now appropriately be charged with some slight percentage of liability," but concludes that this would undermine the foreseeability element of negligence; court applies superseding cause analysis); Hooks v. McLaughlin, 642 N.E.2d 514, 520 (Ind. 1994) (plaintiff argues either foreseeability of his actions under superseding cause analysis, or that Comparative Fault eliminates that common law doctrine; court states that superseding cause has "long" been applied in Indiana, and uses that analysis, but does not further address the question); NKC Hosps. v. Anthony, 849 S.W.2d 564, 569 (Ky. 1993) (superseding cause analysis and comparative fault applied; court then says that "superseding causation, as such, is never submitted to the jury . . . except to the extent that its elements are already incorporated in the comparative fault instructions as simply negligence;" no further discussion of question); Sizemore v. Mont. Power Co., 803 P.2d 629 (Mont. 1990) (sole proximate cause no longer valid after comparative fault adopted, but court seems to allow superseding cause, and explains that proximate cause is still required part of a negligence analysis after comparative fault's adoption); Champagne v. United States, 513 N.W.2d 75 (N.D. 1994) (boy's suicide was not a superseding cause relieving custodian of liability for his death, but note that boy's comparative intentional fault could be considered; discussion focuses exclusively on comparing intentional and negligent conduct in custodial suicide context—no general discussion of topic); Minor v. Zidell, 618 P.2d 392 (Okla. 1980) (court applies superseding cause analysis, considers comparative fault's impact; court then states that comparative fault does not affect the cause-versus-condition distinction in the proximate cause analysis because comparative fault affects breach, not causation; in other words, the court does not squarely address the question).

IV. Case decided under contributory negligence regime.

Bourne v. Seventh Ward Gen. Hosp., 546 So. 2d 197 (La. Ct. App. 1989) (defendant doctors' negligent care was superseding cause of plaintiff's death, despite plaintiff's earlier intentional suicide; comparative fault could not be assigned under old regime).

V. Neither superseding cause nor comparative fault apply.

Bath Excavating & Constr. Co. v. Wills, 847 P.2d 1141 (Colo. 1993); Hickey v. Zezulka, 487 N.W.2d 106 (Mich. 1992) (neither superseding cause nor comparative fault can apply where plaintiff had no duty to protect himself under custodial suicide facts).

argument elides the persuasive reasons for a diminished role for superseding cause in the face of comparative concepts for apportioning liability. Many legal doctrines can survive, in the fashion described by the *Sofec* Court, the adoption of a new and related rule; last clear chance could “survive” the adoption of comparative responsibility because the two are not internally inconsistent nor mutually repugnant.¹²⁷ In short, when the rationale for an earlier doctrine is undercut by the adoption of a new rule, modification or abolition of the earlier doctrine may well be appropriate. And when a plaintiff’s acts, however careless or unreasonable, are denominated a superseding cause, thereby barring recovery, the basic principle of comparative responsibility is substantially undermined.¹²⁸ Indeed, last clear chance—a well-established rule during the time of contributory negligence—can be understood as a rule reciprocal to superseding-cause cases like *Sofec* in which the defendant’s subsequent negligence is a superseding cause of harm.¹²⁹ With last clear chance, a defendant’s subsequent negligence is deemed a superseding cause of the harm, and plaintiff’s contributory negligence, then, does not affect the recovery. Last clear chance has been widely repudiated in comparative responsibility jurisdictions.¹³⁰

Sofec has been remarkably uninfluential in the six years since it was decided. It has not been relied upon by any other court as a basis for a similar holding outside of admiralty law. The lone state case in which it was cited occurred when the court explained to the defendant that its claim that others had caused the harm, not it, was not a superseding cause defense.¹³¹ Despite the confusion and miasma often created by proximate cause, I have some optimism that *Sofec* will not serve as a serious detriment to recognition of comparative responsibility’s impact on the viability of superseding cause.

127. To be fair, the Court’s addressing the issue in this manner may have been a result of petitioners’ framing the issue as whether superseding cause was “irreconcilable” and “inconsistent” with the adoption of comparative responsibility in admiralty. See Petitioners’ Brief on the Merits at 29, *Sofec*, (No. 95-129); Petitioners’ Reply Brief on the Merits at 7-8, *Sofec*, (No. 95-129).

128. For additional criticism of *Sofec*, see FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., ADMIRALTY IN A NUTSHELL 156 (4th ed. 2001); David W. Robertson, *Eschewing Erstatt Percentages: A Simplified Vocabulary of Comparative Fault*, 45 ST. LOUIS U. L.J. 831, 841-42 (2001).

Prior to *Sofec*, several federal courts of appeals addressed the same issue, also under admiralty law, with conflicting results. These cases are discussed in Christlieb, *supra* note 23, at 169-81.

129. See, e.g., *Laws v. Webb*, 658 A.2d 1000, 1008 n.8 (Del. 1995) (“Indeed the trier of fact may conclude that the evidence supporting the concept of last clear chance rises to the level of a supervening cause of the injury.”); *Hunter v. Batton*, 288 S.E.2d 244, 246 (Ga. Ct. App. 1982) (holding defendant’s negligence is deemed the proximate cause of the harm when he has the last clear chance to avoid causing injury and fails to do so); *Cook v. Holland*, 575 S.W.2d 468, 478 (Ky. Ct. App. 1978) (“The claim of last clear chance is in reality a claim that [defendants’] alleged negligence constituted a superseding cause excusing [plaintiff’s] prior negligence.”). However, most commentators view last clear chance as a rule whose purpose is to ameliorate the harsh effects of contributory negligence.

130. See DOBBS, *supra* note 17, § 207, at 522.

131. See *Butler v. Buchanan Marine, Inc.*, No. CV 9501493475, 1998 Conn. Super. LEXIS 1467, at *6-*7 (Conn. Super. Ct. May 22, 1998).

And so it is as well when a third party, rather than the plaintiff, is the intervening act of interest. Comparative contribution permits apportionment between two defendants, each of whose tortious conduct was a factual cause of plaintiff's harm. One difference between plaintiffs as superseding causes and other defendants as superseding causes is that plaintiffs can always bear their comparative share of liability. To do so they do not have to pay any money; they merely bear a greater portion of the harm without compensation. By contrast, among third parties, there may be some who are unable to pay their full comparative share of the plaintiff's damages, which creates the potential for inequitable apportionment among defendants. However, modification of joint and several liability ameliorates or eliminates the risk that a modestly culpable defendant will bear the entire loss, even in those cases in which an egregiously culpable defendant is judgment proof.¹³² So long as the harm that occurs is one of the harms whose risks made a defendant's conduct tortious—the core condition for proximate cause—the existence of other actors whose tortious, even intentional or criminal, conduct concurs to cause harm should not affect the liability *vel non* of the former.

Consider a product liability suit against the manufacturer of a fiber used in carpeting. Plaintiff, who was burned in a fire in a hotel, claims that the fiber was defective for use in carpeting because of its flammability. If the plaintiff is correct, the risk of harm making the fiber defective is that a fire will begin and spread, causing burn damage. Should it matter whether the fire begins innocently, say by lightning, negligently, say, by a guest discarding a match in a hallway, or through criminal conduct, say by an arsonist igniting a fire in a guest room?

For superseding cause purposes, we should recognize initially that regardless of the foreseeability of the source of ignition, the risk that made the product defective is precisely what produced the harm. Unless one lards up the description of the risk with details of the manner in which the harm occurs, contrary to well-settled law,¹³³ it should not be necessary to make the indeterminate inquiry about

132. Something equivalent to inequitable apportionment can occur when a modestly culpable defendant is the sole tortfeasor and causes huge damages. There is substantial fortuity in tort law, and some are unlucky. See Christopher H. Schroeder, *Causation, Compensation and Moral Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 347, 360-61 (David G. Owen ed., 1995) (discussing the concept of fortuity of causation and what remedies are available for a transgression); Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 387 (David G. Owen ed., 1995); Michael Zimmerman, *Luck and Moral Responsibility*, 91 *ETHICS* 374 (1987). That, of course, is why liability insurance is attractive. When there are multiple parties involved, there exists the additional aspect of incomparable treatment among them, which increases their concern.

133. See *RESTATEMENT (SECOND) OF TORTS* § 281, cmt. c. illus. 2, § 435(1) (1965); 4 *HARPER ET AL.*, *supra* note 87, § 20.5, at 162-63 (noting that all authorities agree that the precise course of events that occurred is not important for determining the scope of liability); *DOBBS*, *supra* note 17, § 189, at 466 (finding courts commonly state that a defendant remains subject to liability even if the manner by which the harm occurred was unforeseeable); see also *Larue v. Nat'l Union Elec. Corp.*, 571 F.2d 51, 56-57 (1st Cir. 1978) (holding that a dangerous opening in a fan enclosure of a canister vacuum cleaner exposed defendant-manufacturer to liability even though a child inserted his penis in the opening); *Juisti v. Hyatt Hotel Corp.*, 876 F. Supp. 83, 86 (D. Md. 1995) ("The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected . . . and yet, if the

the foreseeability of the intervening act. The intervening act did not create the risk that made the product defective. Here, the only role of the intervening act was the entirely fortuitous, however unfortunate, provision of the source of ignition. That source of ignition might have come from a variety of places, but so long as there was sufficient risk of a source of ignition to make the fiber defective due to its flammability, it is difficult to find a reason to treat this case differently from a similar one with a different source of ignition.¹³⁴

The best circumstances for eschewing any role for superseding cause in cases involving intentional or criminal intervention is in jurisdictions with several liability that permit apportionment of liability among intentional and nonintentional tortfeasors.¹³⁵ In those circumstances, defendant's liability will be limited to its comparative responsibility share of the harm, even if the arsonist is judgment proof. In jurisdictions that do not permit apportionment between intentional and nonintentional tortfeasors, the products liability defendant is subject to liability for the entire damages, as would be the case if joint and several liability were retained. Courts may be tempted to employ superseding cause to avoid what might appear to be excessive liability. Yet, doing so leaves the entirety of the loss on the plaintiff, and a defendant who should bear at least some liability for the loss without any liability. This constitutes one of the reasons for permitting assignment of comparative responsibility among intentional and nonintentional tortfeasors.¹³⁶

One can imagine the defendant objecting as follows: "The foreseeable risks of harm included accidental ignition of the rug, and I concede that I should be held liable in that event. But, if the intentional act was unforeseeable, it increases the risk of a fire in a way for which I should not be held liable." The difficulty with the defendant's objection is that it confuses negligence or breach of duty with proximate cause. The defendant was already determined to have sold a defective

harm suffered falls within the general danger area, there may be liability . . .") (quoting *Moran v. Faberge, Inc.*, 332 A.2d 11, 19 (Md. 1975) (alteration in original)).

134. That was the conclusion of the Ninth Circuit Court of Appeals in *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886, 893-94 (9th Cir. 1977), in which it rejected the proposition that a criminal act is always a superseding cause of injury. The court cast the issue as whether the arsonist's act was foreseeable, relying on several Arizona cases in which the risk of harm was a criminal act, rather than on the situation before it, in which the facts were not such as to require the defendant to take precautions specifically against the risk posed by foreseeable criminal conduct. *Id.* As the text suggests, approaching cases such as this by asking whether the harm was one of the harms that the defendant failed to take sufficient precautions to prevent (either under a negligence or strict products liability standard) is, in my judgment, preferable. That the flexibility of the idea of foreseeability permitted the *d'Hedouville* court to reach the same result should not distract attention from the connection between the risks that made the defendant's conduct tortious and the harm that resulted, regardless of the intervening causes that were necessary to bring about the harm. *See also* DOBBS, *supra* note 17, § 190, at 473-74 (discussing similar cases).

135. *See supra* note 85 and accompanying text.

136. Such an apportionment rule also requires a supplementary provision making a tortfeasor who is negligent because of the failure to take adequate precautions against an intentional tortfeasor liable both for the negligent tortfeasor's comparative responsibility and for the comparative responsibility of the intentional tortfeasor as well. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 (2000).

product because of the foreseeable risks of a fire. Yet the defendant may still avoid liability if the other events necessary to cause a fire do not transpire. But that outcome is a matter of luck for the defendant—sometimes defendants avoid liability and sometimes they do not based on events over which they have no sway. That is an inevitable consequence of tort law's insistence on factual causation. But that luck is not a matter of right for the defendant who has already acted tortiously. So long as the harm results from the same risks that made the defendant's conduct tortious, there is nothing untoward in holding the unlucky defendant liable.¹³⁷

What about the employer who modifies an industrial machine or otherwise acts negligently to cause, along with a third party, an employee's harm? In the past, two opposing concerns affected courts in addressing whether the employer's conduct was a superseding cause that prevented a product manufacturer from being held liable. One such concern was that employers, because of the exclusive remedy provision of workers' compensation, were immune from tort liability. Thus, tort liability could not create incentives for employers to keep the workplace safe. This was especially true of small employers that operated beneath the occupational regulatory enforcement system and did not have loss-rated workers' compensation insurance. A number of courts appreciated that product manufacturers could, through products liability, be provided incentives to make their industrial machinery and other products safer. This resulted in courts' giving short shrift to the role of an employer in causing an accident and leaving product manufacturers with the obligation to ensure greater safety such as it could.¹³⁸

The opposing tension was the unfairness of holding a manufacturer liable for the entirety of an employee's injury when an employer's culpable or highly culpable conduct also caused the injury.¹³⁹ That, of course, is precisely what occurred with joint and several liability and the immunity from tort liability provided the employer by workers' compensation. A number of courts responded

137. See generally Gary T. Schwartz, *Insurance, Deterrence and Liability*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 335 (Peter Newman ed., 1998) (discussing the risks a tortfeasor takes and the growing trend of liability insurance); Basil A. Umari, Note, *Is Tort Law Indifferent to Moral Luck?*, 78 TEX. L. REV. 467 (1999) (arguing that tort law has no interest in eliminating the role of "moral luck" in imposing liability).

138. See generally *Spurgeon v. Julius Blum, Inc.* 816 F. Supp. 1317 (C.D. Ill. 1993); *Anderson v. Nissei ASB Mach. Co.*, 3 P.3d 1088 (Ariz. Ct. App. 1999); *Pust v. Union Supply Co.*, 561 P.2d 355 (Colo. Ct. App. 1976), *aff'd*, 583 P.2d 276 (Colo. 1978); *Marois v. Paper Converting Mach. Co.*, 539 A.2d 621 (Me. 1988); see also *Bexiga v. Havir Mfg. Corp.*, 290 A.2d 281, 285 (N.J. 1972) (reversing lower court that dismissed plaintiff's case against product manufacturer on the ground that custom was for the employer to provide guards for punch press and therefore the manufacturer did not expect the product to reach the employee without substantial change); *Anderson v. Dreis & Krump Mfg. Corp.*, 739 P.2d 1177, 1184-88 (Wash. Ct. App. 1987) (reversing summary judgment for a defendant-manufacturer based on alterations made to its product after the plaintiff had begun to use it).

139. That unfairness was exacerbated by the subrogation lien provided to employers that enabled them to appropriate workers' compensation payments from any tort recovery by the plaintiff. Thus, the product manufacturer reimbursed even the highly culpable employer for its workers' compensation payments.

by employing superseding cause, or its products liability analog under the *Second Restatement*, substantial modification.¹⁴⁰

The critical initial issue in these cases is whether the product was defective. Typically, these cases involve an employer's modification of a product in a fashion making it less safe, although other behavior, such as failure to maintain the product, may be involved. Assessing defectiveness requires consideration of whether the product manufacturer should have included additional safety equipment, anticipating, for example, that a safety guard would be removed during the cleaning of a machine and might not be reinstalled after the cleaning was completed. Must the manufacturer design the machine with an interlock so that it cannot be operated without the guard in place? We need not address the employer's modification as a superseding cause if the product was not defective.

Defectiveness will depend on comparing the risks that can be removed from the product by the proposed alternative design with the benefits of the existing design.¹⁴¹ If that analysis leads to the conclusion that the benefits of the existing design outweigh the risks it poses, the product is not defective, and any consideration of superseding cause is unnecessary. But I suggest that if the conclusion is otherwise about the defectiveness of the product, there similarly is no need for superseding cause analysis, at least in those jurisdictions that have modified joint and several liability so that non-parties may be considered by the jury for apportionment of comparative responsibility.

Among jurisdictions that permit consideration of a nonparty's comparative responsibility, the role of the employer can be taken into account by permitting the fact-finder to consider the tortious conduct of the employer and to assign comparative responsibility to it. Just as with settling parties whose comparative responsibility is litigated surrogately by the plaintiff and the nonsettling defendants, the plaintiff and the defendants have contrary interests and therefore have the incentive to present evidence and to litigate the role of the employer in causing the plaintiff's harm.¹⁴² Thus, liability can be apportioned in these jurisdictions with a

140. See *Porchia v. Design Equip. Co.*, 113 F.3d 877, 883 (8th Cir. 1997); *Hines v. Joy Mfg. Co.*, 850 F.2d 1146, 1151 (6th Cir. 1988); *Holman v. Mark Indus.*, 610 F. Supp. 1195, 1202 (D. Md. 1985), *aff'd*, 796 F.2d 473 (4th Cir. 1986); *Wagner v. Clark Equip. Co.*, 700 A.2d 38, 45 (Conn. 1997); *Union Carbide Corp. v. Holton*, 222 S.E.2d 105, 108-09 (Ga. Ct. App. 1975); *Conder v. Hull Lift Truck, Inc.*, 435 N.E.2d 10, 14 (Ind. 1982); *St. Pierre v. Gabel*, 351 So. 2d 821, 824 (La. Ct. App. 1977); *Sikorski v. Link Elec. & Safety Control Co.*, 691 N.E.2d 749, 754 (Ohio Ct. App. 1997); *Davis v. Berwind Corp.*, 690 A.2d 186, 190 (Pa. 1997); *Snyder v. LTG Lufttechnische GmbH*, 955 S.W.2d 252, 257 (Tenn. 1997); *Little v. PPG Indus., Inc.*, 594 P.2d 911, 913-15 (Wash. 1979) (en banc); *Glassey v. Continental Ins. Co.*, 500 N.W.2d 295, 301 (Wis. 1993).

141. I assume a risk-utility standard for design defectiveness. We could conduct a similar analysis in a jurisdiction employing a consumer expectations standard.

142. See *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, 627 So. 2d 367, 378 (Ala. 1993); *Estate of Hunter v. Gen. Motors Corp.*, 729 So. 2d 1264, 1279-80 (1999); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 16 cmt. c (2000); Daniel Klerman, *Settling Multidefendant Lawsuits: The Advantage of Conditional Setoff Rules*, 25 J. LEGAL STUD. 445, 448 (1996).

[C]ourts . . . do not find it difficult to determine whether the settling defendant

device that permits a reasonably precise allocation of responsibility for the plaintiff's harm. Of course, the responsibility assigned to the employer will diminish the plaintiff's recovery. However, that consequence follows from the implicit bargain imposed by workers' compensation—plaintiff is assured a recovery for occupational injury regardless of the employer's negligence, but the recovery is more modest than might be available in the tort system. Plaintiff should, rightfully, bear any difference between the workers' compensation payments made by her employer and the amount of tort liability that the employer would have borne under the tort system. Comparative responsibility and modification of joint and several liability permit determination of that amount for the first time.

While the elimination of superseding cause or substantial alteration in occupational product injuries is attractive in jurisdictions that permit apportionment as I describe, I recognize that there are a significant number of jurisdictions that do not permit consideration of the comparative responsibility of the employer. That leaves only the blunt, all-or-nothing apportionment device of superseding cause to address the employer's role in determining liability for an industrial accident. I would expect courts in such jurisdictions to continue to employ superseding cause, but such use should not be mistaken as helpful in those jurisdictions that have more refined tools available.

VI. CONCLUSION

The changes wrought with the advent of comparative responsibility are considerably more extensive than one might have expected. But much of tort law was crafted in a day when negligent plaintiffs were barred from recovery. That rule's influence extended well beyond the obvious one of determining that a negligent plaintiff was barred from recovery. Once tort law recognized that liability could be carved into finely gradated pieces, comparative contribution emerged. Joint and several liability, fired in the oven of innocent plaintiffs, required rethinking and modification when plaintiffs were no longer innocent. From these adjustments, along with the evolution in the legal treatment of causation, recognizing the dual aspects of legal cause and the appropriate role of proximate cause, emerge persuasive reasons to consign superseding cause to the same receptacle in which we have placed contributory negligence.

is liable. The litigating parties have the incentive and the ability to present the relevant evidence and arguments If necessary, the settling defendant can be deposed, subpoenaed, or called as a witness. The procedure to determine whether the settling defendant is liable is very similar to the procedure to determine his percentages [*sic*] of fault"

Id.

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